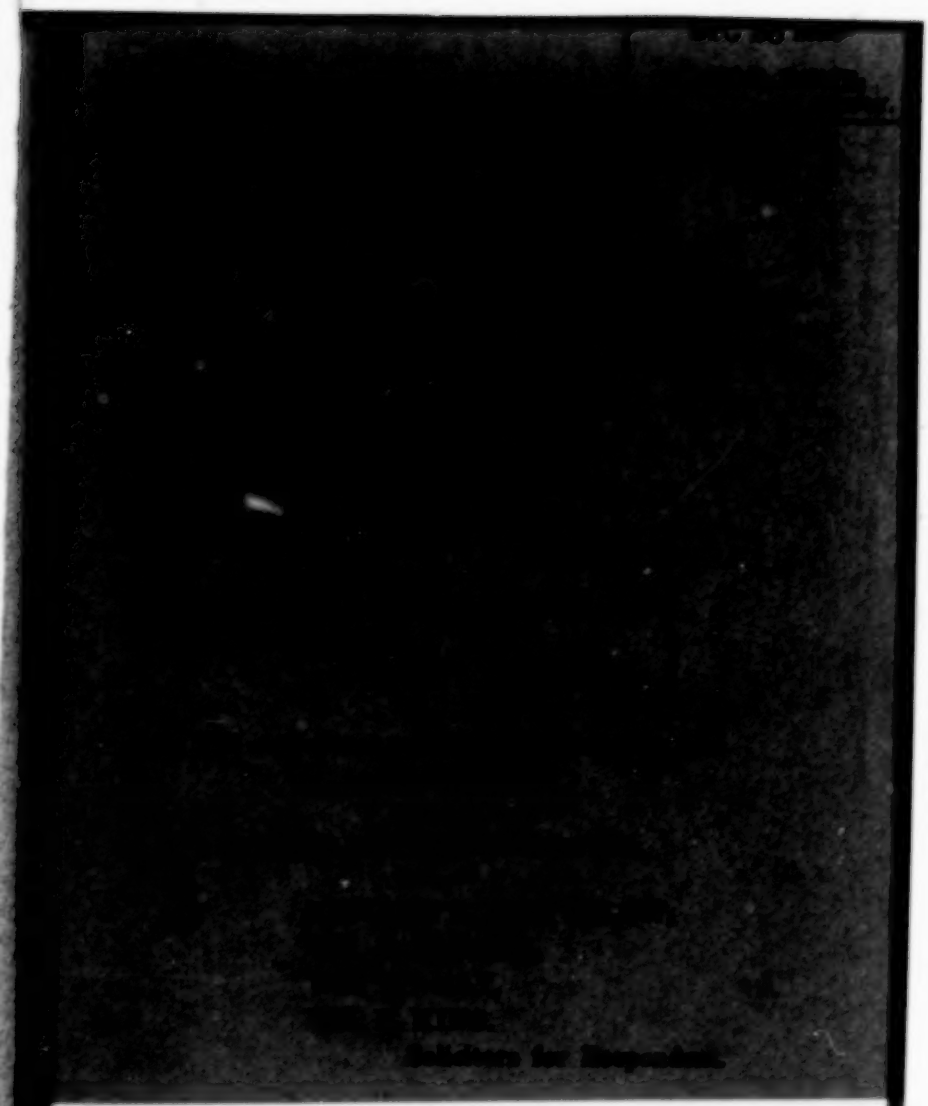


References to the record in this brief are to the side paging of the "Suplemental Transcript" unless otherwise noted. Where the reference is to "Rec. 5188," it is to the side paging of the "Transcript of Record." This was occasioned by the fact that it was necessary to have this brief printed before the printed record in this court was available.

TABLE OF CONTENTS.

CASES CITED.

NOTE: At the date of submission of this brief there had been brought to our attention the original brief accompanying the application for Writ of Certiorari, the brief of Mr. W. C. Prentiss as **Amicus Curiae**, petitioner's Additional Brief on Boundaries and the Solicitor General's Suggestions on behalf of the United States. The two last named were delivered after the major portion of this brief had been prepared. The record before us consists of the printed record of the Circuit Court of Appeals in cases 3977 and 5188 in that court. The latter record only seems to have been reprinted in this court, and it came to hand after the brief had been prepared. Our references to this record are to side-paging. It is believed that in all cases, where not expressly stated, the context will indicate to which record reference herein is made.

The name of Mr. Curtis H. Lindley appears as counsel for petitioner in the original brief accompanying the Petition for the Writ in this case. We note with great regret his death at San Francisco on November 20th. Judge Lindley's talents and learning had made him pre-eminent in that branch of the law with which his name is associated. In his scholarly work on Mines he abundantly paid the debt to his profession, at the same time placing the bench and bar under lasting obligation. His patriotic service during the late war is understood to have hastened the untimely close of a career of great public usefulness.

In the Supreme Court of the United States

October Term, 1920.

SILVER KING COALITION MINES COMPANY, a Corporation,
Petitioner,
vs.
CONKLING MINING COMPANY, a Corporation,
Respondent.

No. 158

RESPONDENT'S BRIEF.

HISTORY OF THE CASE.

This is an equitable action begun in January, 1908, by the predecessors in interest of the Conkling against the Silver King for an accounting by the latter to the former for the value of ores secretly discovered and moved from premises known as the Conkling Lode Mining Claim in Uintah Mining District, Summit County, Utah, amounting in value as alleged to about one million dollars. The parties were co-tenants of the premises, the Conkling owning an undivided three-fourths and the Silver King one-fourth. Subsequently on July 5, 1908, by amended complaint, the Conkling Company became the plaintiff, jurisdiction in the Federal Court attaching solely by reason of diversity of citizenship.

To this complaint an amended answer was interposed December 16, 1911, setting forth three distinct defenses.

1st. That the cost of extraction of the ores, a sum in excess of $72,500, was far in excess of the value of the same, alleged to be not exceeding $20,047.50, and therefore there was no liability to account. (Trans. 5188, p. 30.)

2nd. That the true boundaries of the Conkling Lode Mining Claim were not those described in the Bill of Complaint and in the patent from the United States in that the said claim as patented was not 1500 feet in length as bounded and described therein, but only 1364.5 feet, leaving 135.5 feet of the claim (in which were found the ores), belonging to the Silver King under subsequent overlapping patents granted to its predecessors in interest. (Trans. No. 5188, p. 31 *et seq.*)

3. That the ore bodies in question belonged to and were part of a vein having its apex in certain claims owned by the Silver King, and that the apex of this vein or lode (afterwards referred to in testimony as the Crescent Fissure vein) was so situated with respect to the lines of the claims in which it appeared as to give to the Silver King as its owner, the right to pursue the same extralaterally beneath the surface of the Conkling claim; and that therefore the ores discovered and mined were not those of the co-tenants, but belonged exclusively to the Silver King.

STIPULATIONS. During the course of the proceedings stipulations were made between counsel as to the conduct of the trial for the mutual convenience of the parties and in the interest of the Court. The first stipulation was dated May 6, 1910, and is as follows. (Trans. No. 3977, p. 67.)

"Stipulation as to trial. In confirmation of verbal stipulations heretofore from time to time

made, it is now hereby stipulated and agreed by and between the solicitors for the respective parties in the above entitled cause, as follows:

1st. That all the issues in said cause, excepting only the accounting prayed for, are to be tried before said Court at the earliest practicable time after the first day of June, 1910.

2nd. That after the trial and determination of said issues by said Court, the accounting, if the Court shall determine the plaintiff is entitled thereto, shall then be referred to the Master."

Subsequently, when the cause was brought on for trial on January 29, 1912, (Trans. No. 3977, p. 75),

> "Counsel for plaintiff stated that by the agreement of counsel the question of the ownership of the premises in controversy and the ownership of the vein situated thereon (therein) was to be tried, and that it was stipulated that a decree should be entered upon those issues, and if they should be resolved in favor of the plaintiff, an accounting would then be ordered. To this statement counsel and the Court assented."

First Trial, 1912. The trial upon the issues thus limited and defined was had, many witnesses were produced and much documentary evidence submitted, and on July 15, 1912, an opinion was handed down in favor of the Silver King, sustaining its defense both as to the boundaries and as to the extralateral rights, and dismissing the action. (Trans. No. 3977, p. 257.)

Appeal and Reversal, 1916. From the judgment entered by the District Court, dismissing the cause, an appeal was taken to the Circuit Court of Appeals, and on February 12, 1916, the judgment was reversed. By reference to the opinion (230 Fed. Rep. 553) it will be seen

that the evidence was found to be insufficient to sustain either defense, and the order was for a reversal of the decree of the lower court and a remand for further proceedings consistent with the opinion.

Petition for Writ of Certiorari, 1916. A petition for rehearing having been denied, the Silver King applied to this court for a writ of certiorari. The petition was accompanied by the transcript of the record in the Circuit Court of Appeals, No. 3977, and by a brief in which were fully discussed at large the law and the evidence. This petition was submitted, and was by this Court denied on October 16, 1916, 242 U. S. 629.

The Second Trial, 1917. The mandate was returned from the Circuit Court of Appeals and a decree entered thereon January 20, 1917, (Trans. No. 3977, p. 113,) settling the rights of the parties in accordance with the opinion of the Circuit Court of Appeals, and ordering the Silver King to account to the Conkling for three-fourths of all ores mined within the common property, and directing that an account be brought in and filed by the Silver King as nearly as may be in accordance with the 63rd Equity Rule within twenty days.

Thereupon an account was filed by the Silver King March 31, 1917, (Trans. No. 5188, p. 115,) showing an apparent liability in the sum of $78,638.61, and a few weeks later a *second* account (Trans. p. 123) reducing this to $72,750.76. At the conclusion of the testimony, a *third* account was filed by the Silver King on July 10, 1917, (Trans. p. 426) showing an apparent liability of $262,161.22. Later, on September 17, 1917, a *fourth* ac-

count was filed showing an apparent liability in the sum of $82,510.71 (Trans. p. 41), and in its briefs in the Circuit Court of Appeals the figures were given for a *fifth* account.

The lower court on February 27, 1918, made its order and findings, and directed a decree in accordance therewith (Trans. p. 52), and later, both parties having submitted accounts according to the directions of the Court, a decree was made and entered directing the payment by the defendant Silver King to the plaintiff, of the sum of $542,222.58 as of March 1, 1918. (Trans. p. 62.)

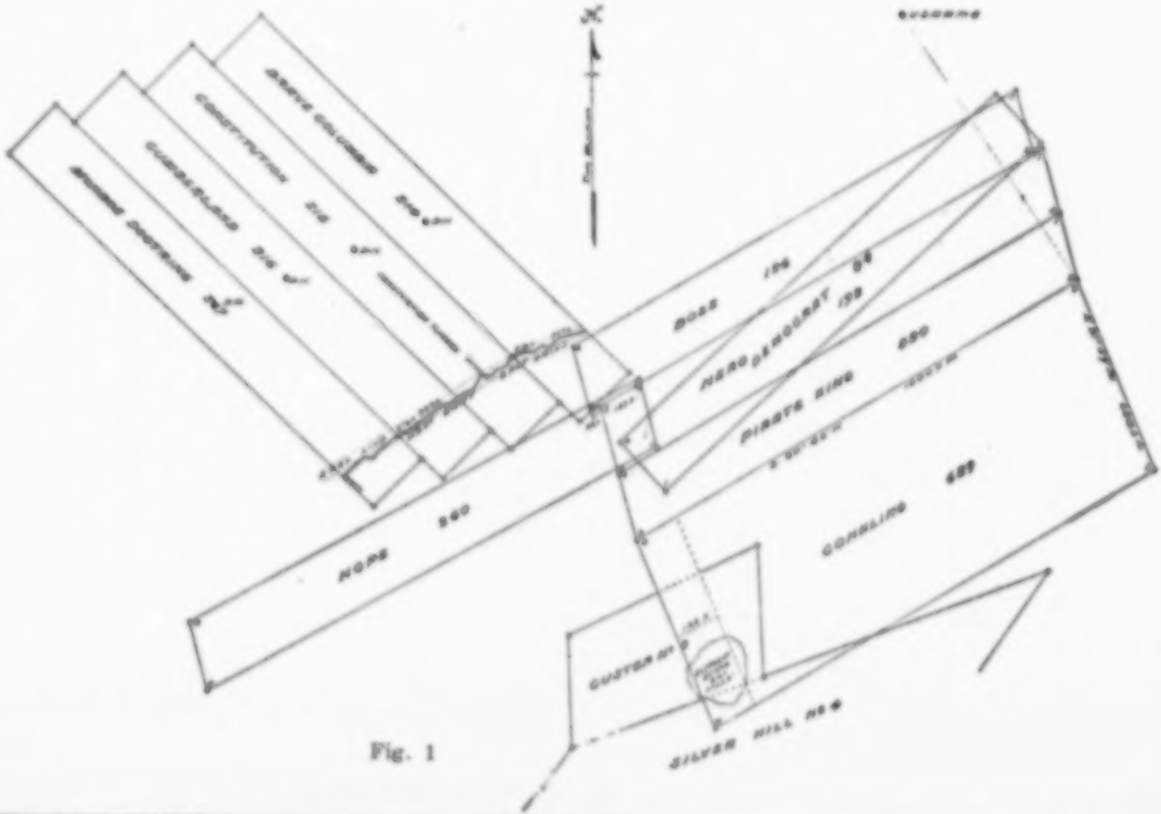
Upon this trial it was disclosed that the ores appropriated by the Silver King were taken *in part only* from the 135.5 feet of the westerly end of the Conkling claim, so that the second defense, that is to say as to the *boundaries*, was a partial defense only. The third defense, as to the ownership of the *apex of the Crescent vein*, and the right to follow the same through located end lines of the claims in which the apex is found was (conceding the identity of the ore body with such vein), a complete defense.

THE SECOND APPEAL, 1918. An appeal was thereupon taken by the Silver King from this decree to the Circuit Court of Appeals, being No. 5188, and a cross appeal was taken by the Conkling. The appeals were heard in September, and December 19, 1918, an opinion was handed down dismissing the original appeal and sustaining the cross appeal by adding to the judgment the sum of $27,853.92.

A petition for a writ of certiorari was duly filed in

this court supported by a brief of its counsel of record which was noticed for presentation at the opening of the October term, 1919. Just prior to the presentation other counsel retained by petitioner for that purpose (see Respondent's Motion to Vacate Writ of Certiorari herein), appeared as *Amicus Curiae* and filed an extended brief upon the merits. The original brief filed with the petition stating the reasons relied on for the allowance of the writ, as required by the rule, together with the further brief filed as though by an *Amicus Curiae* are the only ones filed or served on the petitioner up to the date of preparation of this brief.

Upon the first trial of this cause maps and field notes were introduced by the petitioner. An outline sketch showing some of the claims involved is here presented, upon which it will be noted that the Conkling, Lot 689, is shown, upon which, at the westerly end, is laid a dotted line indicating the westerly end line as claimed by the petitioner. The Elephant stope is also shown, from which it is apparent that the ores were taken in part within and in part from without the limits of the 135.5 foot strip. The Monroe Doctrine, Cumberland, Constitution and Brave Columbia claims are shown, and at the southerly end line of these claims is indicated the West drift and the East drift, driven by the petitioner in 1911, just before the trial of the cause, for the purpose of developing the apex of the Crescent fissure vein. Within dotted lines enclosing these drifts, which dotted lines extend to the easterly of the easterly side line of the Brave Columbia claim, Exhibit "A," the supposed line of the apex, shows.



HOPE 560
BOSS 196
PIRATE KING 690
CONKLING 689
CONSTITUTION
CUMBERLAND
CUSTER No 2
SILVER HILL No 6

Fig. 1

This however is not developed by workings, and does not show upon the surface of the ground, which is heavily covered by wash. No contention has ever been made that any part of the apex of the Crescent fissure vein is so located as to affect the ownership of the Elephant stope ore bodies in question here, excepting that part included within the side lines of the Monroe Doctrine, Cumberland and Constitution claims. It will be observed that the ore body lies between the planes of the extended easterly side line of the Constitution and the westerly side line of the Monroe Doctrine.

THE QUESTIONS INVOLVED.

An examination of the assignments of error and the appeal of the Silver King Coalition Mines Company to the Circuit Court of Appeals (Record 5188, p. 548,) will indicate clearly the matters presented to this court for review.

Assignment No. 21 (p. 561) brings up for review the question of the boundaries of the Conkling lode mining claim, Lot 689.

Assignment No. 22 (p. 561) brings up for review the right of the petitioner to follow the Crescent fissure vein through the located end lines of the Monroe Doctrine, Cumberland and Constitution claims.

The remaining twenty-two assignments of error have to do with the sufficiency of the evidence supporting the decree of the Court for the value of the ores taken.

The same questions are raised in the petition for the writ of certiorari herein and the brief supporting the

same (p. 19 of Petition for Writ, and pp. 11 and 174 of the brief).

On the other hand, the respondent makes the following contentions, which, if sustained, completely answer those of the petitioner:

1. That the boundaries of the Conkling lode mining claim, Lot 689, are, and until altered by a decree of court upon direct attack will continue to be, as set forth in the patent, to-wit, 600 feet in width by 1500 feet in length.

2. That the ores taken from the Elephant stope were not ores belonging to, or a part of, the Crescent fissure vein.

3. That under no circumstances can the petitioner be permitted to follow the Crescent fissure vein through the plane of the located end lines of the Monroe Doctrine, Cumberland and Constitution claims, and that if, under any state of facts, the vein may be followed from its apex upon its dip through located end lines, still, under the conditions existing, there is no right so to follow the Crescent fissure vein.

4. That the District Court and the Circuit Court of Appeals having concurred in the judgment rendered for the value of the ores taken, that question will not be reviewed by this Court.

The discussion of the questions before the Court will be made in the following order:

Boundaries of the Conkling lode mining claim, Lot 689.

Relation of Elephant stope to Crescent fissure vein.

Extralateral rights of the Monroe Doctrine, Cumberland and Constitution lode mining claims.

The judgment for ores taken.

I.

Boundaries of the Conkling Lode Mining Claim, Lot 689.

The patent of the United States to the Conkling lode claim, issued to the Boss Mining Company February 23, 1892, and which was introduced in evidence by the respondent as Exhibit 1 (Record 3977, p. 75), the description in which is admitted by the petitioner, is in the usual form, and the exact wording of it is as follows:

4-462

GENERAL LAND OFFICE. MINERAL CERTIFICATE.
No. 19811. No. 1697.

THE UNITED STATES OF AMERICA.

To All to Whom These Presents Shall Come. Greeting:

WHEREAS, In pursuance of the provisions of the Revised Statutes of the United States, Chapter Six, Title Thirty-two, and legislation supplemental thereto, there have been deposited in the General Land Office of the United States the Plat and Field Notes of survey and the Certificate No. 1697, of the Register of the Land Office at Salt Lake City, in the territory of Utah, accompanied by other evidence whereby it appears that the "Boss Mining Company" did, on the twenty-ninth day of December, A. D. 1890, duly enter and pay for that certain mining claim or premises, known as the Conkling lode mining claim, designated by the Surveyor-General as Lot No. 689, embracing a portion of the unsurveyed public domain, in the Uintah Mining District, in the County of Summit, and territory of Utah, in the district of lands sub-

ject to sale at Salt Lake City, and bounded, described and platted as follows, with magnetic variation seventeen degrees and twenty minutes east.

Beginning at corner No. 1, a pine post four inches square marked U. S. 689 P. I. Thence first course north twenty-one degrees and nine minutes west three hundred feet to discovery point, six hundred feet to corner No. 2, a pine post four inches square marked U. S. 689 P. 2, being also corner No. 4 of Lot No. 191, the Lincoln lode claim, and corner No. 2 of Lot No. 580, the Pirate King lode claim from which U. S. mineral monument No. 4 bears north thirty-two degrees and fifty-two minutes west nine hundred and thirty-nine and three-tenths feet distant; and a pine tree four inches in diameter marked U. S. 689 P. 2 B. T. bears north thirteen degrees west twenty-eight feet distant.

Thence second course, south sixty degrees and forty-five minutes west one thousand five hundred feet to corner No. 3.

Thence third course, south twenty-one degrees and nine minutes east six hundred feet to corner No. 4.

Thence fourth course, north sixty degrees and forty-five minutes east one thousand five hundred feet to corner No. 1, the place of beginning; said Lot No. 689, extending one thousand five hundred feet in length along said Conkling vein or lode, and containing twenty acres and forty-five hundredths of an acre of land, more or less.

Now, know ye, that there is therefore hereby granted by the United States unto the said "Boss Mining Company," and to its successors and assigns, the said mining premises hereinbefore described, and not expressly excepted from these presents, and all that portion of the said Conkling vein, lode or ledge and of all other veins, lodes and

ledges, throughout their entire depth, the tops or apexes of which lie inside of the surface boundary lines of said granted premises in said Lot No. 689, extended downward vertically, although such veins, lodes or ledges in their downward course may so far depart from a perpendicular as to extend outside the vertical side lines of said premises; *provided,* that the right of possession to such outside parts of said veins, lodes or ledges shall be confined to such portions thereof as lie between vertical planes drawn downward through the end lines of said Lot No. 689, so continued in their own direction that such planes will intersect such exterior parts of said veins, lodes or ledges; *and provided further,* that nothing herein contained shall authorize the grantee herein to enter upon the surface of a claim owned or possessed by another.

To have and to hold said mining premises, together with all the rights, privileges, immunities, and appurtenances of whatsoever nature thereunto belonging unto the said grantee above named, and to its successors and assigns forever; subject, nevertheless, to the above mentioned and to the following conditions and stiplatiuons:

First: That the premises hereby granted, with the exception of the surface, may be entered by the proprietor of any other vein, lode or ledge, the top or apex of which lies outside of the boundary of said granted premises, should the same in its dip be found to penetrate, intersect, or extend into said premises, for the purpose of extracting and removing the ore from such other vein, lode or ledge.

Second: That the premises hereby granted shall be held subject to any vested and accrued water rights for mining, agricultural, manufacturing, or other purposes, and rights to ditches and reservoirs used in connection with such water rights as

may be recognized and acknowledged by the local law, customs, and decisions of the courts. And there is reserved from the lands hereby granted, a right of way thereon for ditches or canals constructed by the authority of the United States.

Third: That in the absence of necessary legislation by Congress, the Legislature of Utah may provide rules for working the mining claim or premises hereby granted, involving easements, drainage, and other necessary means to its complete development.

IN TESTIMONY WHEREOF, I, Benjamin Harrison, President of the United States of America, have caused these letters to be made patent, and the seal of the General Land Office to be hereunto affixed. Given under my hand at the City of Washington, the twenty-third day of February, in the year of our Lord one thousand eight hundred and ninety-two, and of the independence of the United States the one hundred and sixteenth.

(L. S.) By the President:

BENJAMIN HARRISON.
By M. McKEAN,
Secretary.
I. R. CONWELL,

Recorder of the General Land Office, *ad interim.*

The petitioner was permitted by the trial court to introduce evidence for the purpose of controlling and varying the plain terms of this conveyance. The trial court refused to quiet in respondent the title to the westerly 135.5 feet of said claim. The holding was that the evidence introduced raised a latent ambiguity as to the description, and that of the two descriptions contended for by the respective parties, that which brought about the result referred to must prevail. The ground of the Court's de-

cision, as appears from its opinion (Record 258) is that it was proper to consider as a part of the description the field notes of the official survey made under the direction of the U. S. Surveyor General, and that applying to the description or reading into the description contained in the patent these field notes, a strip of ground 135.5 feet in width and having a length equivalent to the width of the claim is to be excluded from the calls of the patent. This question being taken to the Circuit Court of Appeals by the respondent was decided in its favor, the holding being that the trial court was mistaken in its finding that the patent did not convey the westerly 135.5 feet of the land described in it, and that the respondent is co-owner with the petitioner in the entire tract 1500 feet in length and 600 feet in width described in the patent (230 Fed. 560). This holding was based by the Court upon two distinct grounds: First, that it was not proper to control or vary the plain and unambiguous terms of the patent on a collateral attack by means of evidence *dehors* the patent; and, second, that the evidence introduced in this case was insufficient to show that the posts of the original survey were placed at the points contended for by the petitioner.

This ruling of the Circuit Court of Appeals was clearly correct.

1. *The patent of the United States is the deed of the owner (U. S. v. Stone, 2 Wall. 525), and in the absence of statute is to be construed in accordance with the rules of the common law.*

It will possibly not be contended by the petitioners that a statutory rule of construction for the first time established in 1904 is applicable to the grant in question. The statute was not deemed applicable by the trial court, obviously upon the ground that if the statutory interpretation in any manner changed the description to the detriment of the respondent it would be unconstitutional.

By the testimony introduced in respect to the boundaries of the Conkling lode claim over the objection of the respondent the petitioner claimed to show that the surveyor, Adolph Jessen, long since deceased, in making his survey in 1889, or in returning his field notes thereof, committed a blunder, by which he either did not place the end lines of the claim or two of the corners where he should have placed them, or else by mistake marked two trees as bearing trees when he should have marked two other and different trees. If the evidence of the petitioner be admitted it is perfectly apparent that a blunder or blunders were made, but whether they were committed by Mr. Jessen in his surveys or (as would seem more probable as we shall hereafter show), by Joseph Gorlinski, also long since deceased, in his survey of the Hope, is by no means clear. The trial court, against respondent's objection, undertook to determine that the blunders were those of the Conkling surveyor in not making his surveys, in

numerous instances, conform to his own figures for course and distance, to correct the description in the patent accordingly and thereby diminish the grant from the United States to respondent's predecessor in interest.

The description in the patent was clear and unambiguous, and under familiar rules it was not competent to introduce evidence to raise an ambiguity or uncertainty, and in the light of further evidence, solve it. As to the corners Nos. 3 and 4, there were no monuments called for in the patent. The corners were merely abrupt changes in direction. The point of beginning and corner No. 2 of the survey were fixed and in no wise in dispute. (Rec. 84.) It was, therefore, not permisible to consider the evidence of Brooks (Rec. 78), or to receive and consider the copies of field notes of survey of the various claims, Conkling, Hope, Pirate King, etc. (Rec. 80, 81, 82, 85), and objection thereto was made by respondent's counsel. (Rec. 82, 83.) So also the testimony of J. Fewson Smith (Rec. 86), Walter H. Wiley (Rec. 90), and Robert Gorlinski (Rec. 92) was improperly admitted and considered.

The rule applicable is laid down in the following authorities:

> "The general rule stated more fully is, that parol evidence cannot be admited to control or contradict the language of a deed, but latent ambiguities can be explained by such evidence. Facts existing at the time of the conveyance, and prior thereto, may be proved by parol evidence with a view of establishing a particular line as being the one contemplated by the parties when *by the terms of the deed* such line is left uncertain. * * *

The defendants' case was the same as if no monument had been given or called for. In such case parol evidence is not admissible to control the courses and distances. 3 Wash. R. P. 403; Drew v. Swift, 46 N. W. 209; Bagley v. Morrill, 46 Vt. 94."

Pollard v. Shively, 5 Colo. 315-317.

"But, if courses and distances are given, but no monuments are given or called for in the deed, parol evidence is not competent to control these."

3 Washburn on Real Property (5th Ed.), p. 428.

"Evidence was admitted upon the trial, of the admission and statements of the defendant, as to the lines and boundaries of the divisions of the lot, and especially as to the lines of the Trowbridge survey, and the jury were charged that the evidence might be considered by them, for the purpose of fixing the line as laid down by Trowbridge. The grant to the defendant was not made in reference to that survey or the lines then laid down, but was made by clear and distinct descriptive boundaries, and assuming as we must, that Stone was the owner of the premises, the description was not aided and there was no ambiguity which could be remedied by reference to that survey. The declarations of the defendant, or other parol evidence, could not be resorted to, to vary the terms or aid in the interpretation of the deed. There was no ambiguity in the language of the instrument. The description begins at a point capable of being ascertained and runs thence by courses and distances well defined; and no extrinsic evidence, tending to explain the intention of the parties, and thus give effect to the deed different from its terms, was allowable. A deed cannot be contradicted, varied or explained by parol evi-

dence. Where there are no monuments, or if monuments once existing are gone, and the place where they originally stood cannot be ascertained, the courses and distances, when explicit, must govern and cannot be controlled or affected by parol evidence. (Linscott v. Fernald, 5 Greenl. 496; Bell v. Morse, 6 N. H. 205; Van Wyck v. Wright, *supra;* Clark v. Baird, 5 Seld. 183; Clark v. Wethy, 19 Wend. 320.)"

Drew v. Swift, 46 N. Y. 204.

"The deed is the evidence of the intention of the parties and it is drawn * * * as it might well have been had it been intended that the measurements should govern and not the fence. * * * The rule on the subject is thoroughly established. Where no monuments are named in a grant and none are intended to be afterwards designated as evidence of it, the distances stated therein must govern the location."

Negbaur v. Smith, 44 N. J. L. 672.

The foregoing is the rule settled by decisions of this Court.

"If a grant be made which describes the land granted by course and distance only, or by natural objects not distinguishable from others of the same kind, course and distance, though not safe guides, are the only guides given us and must be used."

Marshall, C. J., in Chinoweth v. Haskell, 3 Pet. 92.

"The Court instructed the jury that the grant to the plaintiffs, which was given in evidence, was a complete appropriation of the land therein described, and vested in the patentee the title; and that any defects in the preliminary steps by which it was acquired were cured by the grant.

> "There can be no doubt of the correctness of this instruction. This Court has repeatedly decided that at law, no facts behind the patent can be investigated. A court of law has concurrent jurisdiction with a court of equity in matters of fraud; but the defects in an entry or survey cannot be taken advantage of at law. The patent appropriates the land, and gives the legal title to the patentee. The District Court said nothing more than this; and it was justified in giving the instruction by the uniform decisions of this Court."
>
> Boardman v. Lessees of Reed, 6 Pet. 328.

The rule contended for by respondent was laid down and adhered to in an early case in the Supreme Court of Michigan. A patent of the United States was in question in which one of the boundary lines terminated in a post. When the matter came into question the post was no longer to be found, and no evidence was adduced to show where the same was originally located. The Court held that the rule to be applied was as if no post had been called for and parol evidence was not admissible to vary or control the courses and distances called for in the patent. The rule laid down by the Supreme Court of the United States was adopted, the Court using this language:

> "The proposition was not, then, to prove to the jury that there was a disagreement between the courses and distances, and the monuments and boundaries, as given in the patent, and as they are found on the land, but to show that there was an actual line on the ground, not described or called for in the patent, but, in fact, intended by the surveyor, Greeley, as one of the boundaries of the

plaintiff's grant. To admit parol proof of a marked line, nowhere mentioned in the deed, but entirely variant from its calls, would serve to render titles to real estate dependent, not on deeds of conveyance, and the language of the grantor, and courses, distances and monuments, but on the mere memory of witnesses: 5 Greenl. R. 502 (decided in 1829).

In 5 Greenl. R. 503, the Court says: 'It has often been decided by other courts, as well as this, that where there are no monuments referred to in a deed of conveyance, or if they are gone, and the place where they originally stood cannot be ascertained, the courses and distances mentioned in the deed must govern the parties and those claiming under them; for in such case there can exist no latent ambiguity, because no extrinsic facts or circumstances exist to create it.'"

Bruckner's Lessee v. Lawrence, 1 Douglas 19.

In Wells v. Jackson Iron Mfg. Co., 47 N. H. 235, 90 Am. Dec. 575, the Court holds that a survey of land and the erection of monuments with a view to subsequent conveyance cannot be admitted in evidence to vary or control the deed afterwards made where the deed calls for none of the monuments and does not refer to the survey. The Court uses this language:

"The effect of the evidence at most could be merely to show that Willey and Thompson intended a different tract of land from that afterward conveyed by the deed if the lines of their exploration are found to differ from the calls of the deed; and its reception to control the deed would be in violation of a principle quite elementary."

Counsel for petitioner do not dispute the general rule of law that where there is a call in a deed for a boundary by course and distance, not limited or controlled by a post or monument, parol evidence is not admissible to show that as a matter of fact the line was intended to end at a given monument or other object. The language in their brief is as follows (p. 69):

> "We do not question the general rule that where there is in a private deed of conveyance a call for a boundary line of given distance, without any statement that the end of the line is marked upon the ground by any post, monument, or other object, parol evidence is not receivable to show that as a matter of fact the line was intended to end at a given post, monument, or other object. The intention of the parties as to what is conveyed is to be determined in a private conveyance altogether from the language of the conveyance. The deed, being the final repository of the intention of the parties, is not in such cases suffered to be altered by parol testimony. If the deed does not upon its face show an intention that its calls for distances shall be limited by monuments, it is presumed that no such intention existed."

In further support of the rule thus conceded, and to illustrate the scope and universality of its application, the following cases are referred to:

> "It has often been decided by other courts, as well as this, that where there are no monuments referred to in a deed of conveyance, or if they are gone, and the place where they originally stood cannot be ascertained, the courses and distances mentioned in the deed, must govern the parties and those claiming under them; for in such case

there can exist no latent ambiguity, because no extrinsic facts or circumstances exist to create it."

Linscot v. Fernald, 5 Greenl. 503.

"Lines and boundaries cannot be constructed with reference to objects that may be found upon the ground as indicating the footsteps of the surveyor where there are no calls in the grant for such objects."

Stark v. Adams (Texas), 183 S. W. 58 (1915).

"Lines and boundaries described in a deed cannot be controlled by objects found on the ground indicating the footsteps of the surveyor where there are no calls for such objects."

M. K. & T. Ry. v. Anderson (Texas), 81 S. W. 781.

"It has been held that where the description in the deed is definite and certain, parol evidence that other land than that described was intended to be conveyed is not admissible in trespass to try title; it being only in a suit to correct a deed on the ground of fraud or mistake that its terms can be so varied or contradicted."

McFaddin v. Johnson (Texas), 180 S. W. 306.

"The language of this deed, interpreted in connection with, and in reference to the nature and condition of the subject-matter of the grant at the time the instrument was executed, and the obvious purpose the parties had in view, is clear and unambiguous, its meaning is a question of law for the Court, and the intent cannot be altered by evidence, or findings of extraneous circumstances. Crosby v. Montgomery, 38 Vt. 238. The language being clear and unambiguous, the deed is to be interpreted by its own language, and the Court is

not at liberty to look at extraneous circumstances for reasons to ascertain its intent, and the understanding of the parties must be deemed to be that which their own written instrument declares. Smith v. Fitzgerald, 59 Vt. 451, 9 Atl. 604; Clement v. Bank of Rutland, 61 Vt. 298, 17 Atl. 717, 4 L. R. A. 425; Marsh v. Fish, 66 Vt. 213, 28 Atl. 987; New York Life Ins. & Trust Co. v. Hoyt, 161 N. Y. 1, 55 N. E. 299."

Vermont Marble Co. v. Eastman (Vt.), 101 Atl. 159.

"If the land intended to be granted appears clearly and satisfactorily from any part of the description in a deed, and other circumstances of description are mentioned which are not applicable to that land, the grant will not be defeated, but those circumstances will be rejected as false or mistaken."

Thompson v. Hill (Ga.), 73 S. E. 640.

"The plat is not given by way of more particular description, but as a pictorial representation of what has been described. It is not intended to conflict with the written description, and should not be so considered. But, if the plat conflicts with the previous particular description, the lot must be located according to the particular description. Where a deed describes the lot conveyed by metes and bounds, and refers to a plat as representing them, the reference is not to enlarge or diminish the effect of the descriptive words of the conveyance, but to give them efficacy; and the operative words are found in the deed itself. Thompson v. Hill, 137 Ga. 308, 73 S. E. 640; Kenyon v. Nichols, 1 R. I. 411; Hale v. Swift (Ky.), 63 S. W. 288."

Wooten v. Solomon (Ga.), 77 S. E. 376.

"Even if stakes had been set, they would not control the description in the deed unless referred to therein. Powers v. Jackson, 50 Cal. 429. * * * It is very true that where courses and distances mentioned in a deed conflict with fixed monuments therein mentioned, the reference to monuments will control; but that is not this case. Here no survey or stake is mentioned. The initial point is a street corner, the location of which in this particular instance was notorious, and with buildings and sidewalks so designating its position that a reference to it was, in fact, a reference to a permanent, known, and visible monument. The description is plain upon its face, and there are no surveys, stakes, or other monuments, mentioned which render the description uncertain in any respect. The southeast corner of block 1 being ascertained, the deed speaks for itself."

Crandall v. Mary (Oregon), 135 Pac. 188.

"Where in establishing a boundary there are no objects to control, the Court must accept the calls and distances in conveyances after finding the point of beginning of a line."

Lees, Adm'r v. Glass (Ky.), 104 S. W. 739.

"But where a deed describes a particular lot of ground by metes and bounds, and fixes its beginning corner by calling for a well-known point, like a street corner, and, after thus definitely locating the exact ground, attempts to further describe it by giving a map number, which conflicts with the location, then the lot must be located according to the particular description, and not its map number."

Hale v. Swift (Ky.), 63 S. W. 288.

"In an action for the establishment of a boundary where the deed was unambiguous, parol evi-

dence that the parties intended another boundary than that expressed is inadmissible, even though it would be admissible in an action to reform the deed."

Van Ness v. Boinay (Mass.), 101 N. E. 979.

"The tenth assignment of error is to the granting of the instruction prayed by the defendant, which was 'that the plat attached to the grant to the Tates cannot control the calls of the grant itself, and, wherever they differ from the calls of the grant, the grant must control, in determining the location of the land granted in the grant,' which the Court gave, with the remark, 'The Court gives you that, with the charge already given you.' In his general charge the Court had instructed the jury 'that, in resolving a doubt or ambiguity in a deed or grant, you have the right to call to your assistance the plat made by Henry at the time the grant was issued.' That a plat may be used to correct a mistake in a grant is well settled by the cases cited by the plaintiff in error, and so the presiding judge, in effect, charged; but no case has been cited to the effect that the plat may control the grant. The case of Hurley v. Morgan, 18 N. C. 432, is direct authority to the converse. It is the grant that passes the title, and it must control, if it is certain. It is only when it is ambiguous that the plat usually annexed to it may be referred to, to resolve the ambiguity or to correct the mistake."

Scaife v. Western North Carolina Land Co. et al. (C. C. A. 4th Cir.), 90 Fed. 245.

"The marked trees and lines of a survey shall govern; but not the return of survey which is only evidence of it."

Yoders Lessee v. Fleming (Pa.), 2 Yeates 311.

"Where a deed calls for natural and known boundaries which are inconsistent with the description given in the deed by courses and distances, such natural and known boundaries control the boundaries by courses and distances; but if, on the contrary, the deed describes the land by courses and distances and not by natural or known boundaries, the description by courses and distances is to be adopted. Hunter v. Lank, 1 Har. 10."

Nevin v. Disharoon (Del.), 66 Atl. 362.

"There is no call in the field notes of the deed for the Montgomery fence or any object upon the ground found or established by the surveyor in running that line. It is held that, where the deed calls for certain well known and established objects, such calls will not be controlled by objects found upon the ground as indicating the footsteps of the surveyor in making the survey, when not called for in the deed. Watts v. Howard, 77 Tex. 71, 13 S. W. 966: Cavin v. Hill, 83 Tex. 76, 18 S. W. 323; Railway Co. v. Anderson, 81 S. W. 781; Anderson v. Stamps, 19 Tex. 460; Ratliff v. Burleson, 7 Tex. Civ. App. 624, 25 S. W. 983, 26 S. W. 1003; Jamison v. Land Co. (Tex. Civ. App.), 77 S. W. 969; Hamilton v. Blackburn (Tex. Civ. App.), 95 S. W. 1097. In the case of Watts v. Howard, supra, it was said: 'In trespass to try title it is not competent to show by parol evidence that it was intended by the parties to a deed, through which an attempt is made to deraign title, to convey land not actually embraced in the description contained in the deed.' The calls in the partition deed are unambiguous, and are not alleged or shown to have been made by mistake, and cannot be controlled by parol evidence of the existence of objects not called for in the deed discovered by the surveyor in running the lines for partition."

Brodbent v. Carper (Texas), 100 S. W. 185.

"This contention of the defendant violates all rules of construction, as we are taught to understand them. The first general rule, to which we know of no exception, is that, from a known or an agreed point, course and distance must govern, unless there is some natural object called for in the deed or grant that is more certain than the course and distance called for."

Tucker v. Satterthwaite (N. C.), 31 S. E. 724.

"Where the language is clear, unequivocal and unambiguous, the contract is to be interpreted by its own language, and courts are not at liberty to look at extrinsic circumstances surrounding the transaction, or elsewhere, for reasons to ascertain its intent; the understanding of the parties must be deemed to be that which their own written agreement declares. (Springsteen v. Samson, 32 N. Y. 703, 706.) Under any other rule 'no lawyer would be safe in advising upon the construction of a written instrument, nor any party in taking under it, for the ablest advice might be controlled and the clearest title undermined if, at some future period, parol evidence of the particular meaning which the party affixed to his words, or of his secret intention in making the instrument, or of the objects he meant to take benefit under it, might be set up to contradict or vary the plain language of the instrument itself.' (Shore v. Wilson, 9 Clark & Fin. 355-366.)"

New York Life Ins. Co. v. Hoyt, 161 N. Y. 1.

The rule that where there is a conflict between courses and distances and objects establishing boundary lines of another survey, the course and distance must yield and the natural objects and boundaries of other tracts called for

must be accepted, is not of universal application, and was expressly disregarded by C. C. A. 6th Cir. in

Rowe v. Hill, 215 Fed. 522.

> "The object of the bill is to have the Court go behind Irwin's mapped plat and investigate his field notes, which field notes, it is claimed, properly extended, would have made the plat, if properly drawn, show the 40 acres to be in fact east of the creek. The court below refused to allow this in this proceeding, and so do we. Martin's conveyance was by the recorded plat, not by the marginal field notes. If they were incorrectly mapped, the conveyance was none the less by the plat, and this cannot be affected by any mistake in them. It is questionable if any man buying by a recorded map would bother about field notes. Without the plat Haley would have nothing. He is bound to claim under it, but wants to claim under it as incorrect, and to have the error corrected by the field notes. It is not possible he can claim under the field notes, because the conveyance was not by them, but by the plat."

Haley v. Martin (Miss.), 38 So. 99.

The rule that fixed monuments are to prevail over courses and distances, in applying the description of land, applies with less force to those which are artificial than to natural and permanent objects, and fails entirely when, from the designation of quantity or other elements of description, it is apparent that the courses and distances are correct. Per Selden, J.

Baldwin v. Brown, 16 N. Y. 359.

> "The rule stated (that courses and distances must yield to ascertained objects called for by the grant) is not inflexible and has some exceptions. It applies with less force to monuments which are artificial than to natural and permanent objects,

and when there is anything in the description which shows that the courses and distances are right in themselves, they will prevail because the primary object in all cases is to carry out the intention of the parties; as, when it is apparent from the face of the deed that the intention was to convey a specific quantity of land, if the courses and distances given would include such quantity, and the description by monuments embraces more or less, the former should be followed."

Higginbotham v. Stoddard, 72 N. Y. 99.

But it is contended that this rule does not apply in cases of patent of the government where, as claimed, "the situation is obviously quite different."

2. *The boundaries of the Conkling claim as clearly set forth in the patent without ambiguity, are conclusively established by the patent. No evidence is admissible to contradict or vary the patent.*

The field notes and the survey of the Conkling and other claims, together with the evidence respecting the posts and bearing trees and all evidence as to monuments, was admitted by the lower court over the objection made by respondent (pp. 82-83 of record), that this testimony was incompetent, irrelevant and immaterial, for the reason that the patent itself was without ambiguity and constituted a contract between the government and the patentee and that it was incompetent to introduce evidence to create an ambiguity, and then introduce further evidence to establish the boundaries at places different from those called for by the patent.

A vital distinction existed up to the year 1904 between the rules which govern in the determination of the boundaries of the lands conveyed by a government patent, as the same were applied to agricultural lands and as they were applied to mineral lands.

As to the agricultural land, from the beginning, it has been expressly provided by the statute, that the lines as actually run upon the ground by the surveyor, control in case of conflict between said lines and the courses and distances of the government patent. (Sec. 2396 U. S. Statutes; Fed. Statutes Annotated, Vol. 6, p. 397.)

No such statute was ever passed by Congress with respect to mineral lands until the year 1904. In fact, prior to the year 1904 the Statute, R. S. Sec. 2327, which governed as to the descriptions or boundaries of claims conveyed by lode claim patents, expressly directed that the Surveyor General should treat as the boundaries of such claims the lines *described* and *platted*.

The Statute at that time read as follows: (Italics ours.)

> "Section 2327. The description of vein or lode claims, upon surveyed lands, shall designate the location of the claims with reference to the lines of the public surveys, but need not conform therewith; but where a patent shall be issued for claims upon unsurveyed lands, the Surveyor General in extending the surveys, shall adjust the same to the *boundaries* of such patented claim, *according to the plat or description thereof*, but so as in no case to interfere with or change the location of any such patented claim."
>
> 5 Fed. Stat. Ann. 41.

It was the evident purpose of this Statute that these claims should be so measured and platted that the descriptions placed in the patents and the plats in the Surveyor General's office according therewith should constitute the final record upon which reliance should be placed, and such was the construction placed upon it prior to the Brooks' amendment of 1904 by the Land Department, speaking through its chief law officer, now a member of this court.

Mono Fraction Lode Mining Claim (1901),
31 L. D. 121.

The amendment of 1904 changed this rule by providing that the monuments established upon the ground should at all times constitute the highest evidence as to the boundaries of the tract conveyed and directed the Surveyor General to act accordingly.

The Statute as thus amended, reads as follows, the added or changed portions being italicized:

> "Section 2327. The description of vein or lode claims upon surveyed lands shall designate the location of the claims with reference to the lines of the public survey, but need not conform therewith; but where patents *have been or* shall be issued for claims upon unsurveyed lands, the Surveyors General, in extending the public survey, shall adjust the same to the boundaries of said patented claims so as in no case to interfere with or change the *true* location of such claims *as they are officially established upon the ground. Where patents have issued for mineral lands, those lands only shall be segregated and shall be deemed to be patented which are bounded by the lines actually marked, defined, and established upon the ground by the*

manuments of the official survey upon which the patent grant is based, and Surveyors General in executing subsequent patent surveys, whether upon surveyed or unsurveyed lands, shall be governed accordingly. The said monuments shall at all times constitute the highest authority as to what land is patented, and in case of any conflict between the said monuments of such patented claims and the descriptions of said claims in the patents issued therefor the monuments on the ground shall govern, and erroneous or inconsistent descriptions or calls in the patent descriptions shall give way thereto."

An examination of these acts shows by that the amendment of 1904, Congress, for the first time, provided that with respect to patents of mineral land, the lines as run on the ground by the surveyors, should control in case of conflict.

Since 1904, by virtue of the amendment mentioned, the policy of the government and the law with respect to the effect of patents, is the same both as to agricultural lands and as to mineral lands.

Prior to 1904, however, the policy of the government was different with respect to the two classes of public lands.

As to mineral lands, there being no statute which made the lines as run upon the ground control in the case of conflict between such lines and the courses and distances of the patents, but on the contrary, the law as it then stood evidencing the opposite intention, it was of necessity true that a patent which in plain and unambiguous language conveyed a definite and well defined tract of

mineral land, operated to transfer to the patentee, the title to the land described in the patent.

The original survey, the original plat made by the surveyor, and all the evidence of acts done prior to the issuance of the patent were submitted to the land department, which had final jurisdiction; and from all these, the land department determined and had a right to determine what land the claimant was entitled to receive, and the patent, ordered by the land department and issued by the government, was the adjudication, by competent authority, that the precise land described in the patent should be and was conveyed to the patentee who was entitled thereto. This adjudication by competent authority was final and conclusive, and not subject to any collateral attack. This is abundantly established by the authorities.

Uinta Tunnel Co. v. Creede etc. Co., 119 Fed. 164. In this case (affirmed by this court) the United States Circuit Court of Appeals, Eighth Circuit, speaking by Judge Sanborn, said (page 166):

> "If the query were whether or not it is competent to show by proof outside the receiver's receipts or the patents that there had been no location of the patented claims or no discovery of the lodes therein before they were entered for patent, there would be no doubt that a negative answer must be returned to the question for the reason that this is an issue between the parties to a proceeding before the land department which that tribunal necessarily considers and decides when it permits the entries of the lands, and its decisions of questions within its jurisdiction are impervious

to collateral attack. King v. McAndrews, 111 Fed. 860, 863, 50 C. C. A. 29, 32. * * *

A judgment is binding upon the parties to the proceeding in which it is rendered and upon their privies. The parties to the judgments of the land department by which it allowed the entries of the lode claims in the case of the gold mining company were the United States and the owners of those claims. No other parties had or claimed any interest in the land at the time those entries were made. The judgments and the patents accordingly bound and estopped these parties and their subsequent assignees."

King vs. McAndrews, 111 Fed. 860. In this case, the Circuit Court of Appeals, speaking by Judge Sanborn, said (pages 863-866):

"These are the rules and principles which this Court deduced from the decisions of the Supreme Court upon this issue:

The land department of the United States, including in that term the secretary of the interior, the commissioner of the general land office, and their subordinate officers, constitutes a special tribunal vested with judicial power to hear and determine the claims of all parties to the public lands which it is authorized to dispose of, and with power to execute its judgments by conveyance to the parties entitled to them. 9 Stat. 395, c. 108, Sec. 3 (Rev. St. Sec. 441); 5 Stat. c. 352, Sec. 1 (Rev. St. Sec. 453).

A patent of land within its jurisdiction, issued by the land department, is the judgment of that tribunal, and a conveyance of the legal title to the land to the patentee in execution of the judgment. When such a patent to land within the jurisdiction of the department is issued, it is, like the judgments of other judicial tribunals, impervious to collateral attack. * * *

But land which the department is vested with the power and charged with the duty to hear and decide the claim of applicants for and to dispose of in accordance with its decision, is within its jurisdiction, and its patent of such land conveys the legal title to it, and is impervious to collateral attack, whether its decision is right or wrong. * * *

These established principles have been re-stated and these authorities have been again cited because they control the disposition of the case in hand, and because counsel for the defendants seem to be impressed with the view that every decision by the land department of the many grave and complicated issues which condition the rightful issue of a patent is a mere ministerial act, open to collateral attack for every error of law into which the officers of that department may fall, in every action at law in which the title under the patent is involved. 104 Fed. 432. Such is not the law. The decisions of that department are judicial acts. The patents it issues are judgments of a quasi judicial tribunal. In cases within its jurisdiction they are presumptively right, and as impervious to collateral attack for errors of law or for mistakes of fact as the judgments of the courts, and all cases are within the jurisdiction of this department in which Congress has intrusted to it the determination of the rights of the claimants, and the disposition of the land in accordance with its decision."

"Upon this subject the Supreme Court said in Refining Co. v. Kemp, 104 U. S., at page 646, 26 L. Ed., at page 878, that 'a patent, in a court of law, is conclusive as to all matters properly determinable by the land department, when its action is within the scope of its authority; that is, when it has jurisdiction under the law to convey the land. In that court the patent is unassailable for

mere errors of judgment. Indeed, the doctrine as to the regularity and validity of its acts, where it has jurisdiction, goes so far that if in any circumstances, under existing law, a patent would be held valid, it will be presumed that such circumstances existed.'"

Doe v. Waterloo Mining Co., 54 Fed. 935. In this case, Judge Ross said (p. 940):

"If the rights conferred by the patent can be defeated by showing a want of parallelism of the end lines in the original location, it is difficult to understand why the patent may not likewise be defeated by showing that the original location was void because its boundaries were not properly marked upon the ground, or because no vein, lode, or ledge was discovered within them, or because the statutory requirement in respect to the posting of the notice of location was not complied with, or because of an omission on the part of the locator to comply with any other provision of the statute regarding the location of such lode claims. All such matters I understand to be absolutely concluded by the patent so long as it stands unrevoked. If questions relating to the boundaries of the location, the marking of them, the discovery of a vein, lode or ledge within them, the posting of the required notice, etc., are open to contestation after the issuance of a patent for the claim as before, the issuance of such an instrument would be a vain act, and would wholly fail to secure to the patentee the rights and privileges designed by the law authorizing its issue. The very purpose of the patent is to do away with the necessity of going back to the facts upon which it is based. Authorities to this effect in both federal and state courts are so numerous as to render it, I think, unnecessary to cite them."

Carson City etc. Co. v. North Star etc. Co., 73 Fed. 597. In this case, Judge Beatty said (p. 600):

> "Independent, however, of the foregoing consideration, a patent has been granted for the North Star claim. It has passed beyond the field of discussion that a patent cannot be collaterally attacked on account of any question which the land department could lawfully determine before issuing it. Without now defining what questions are settled by the issuance of a patent, it is held that the question of the defendant's right to a patent to the North Star, with the boundaries as defined by it, was within the jurisdiction of the department, and was determined by it, from which it is held to follow that the boundary lines, as defined by the patent, are the only lines by which the rights of the parties can be determined. To adjudge such rights by the original lines of the several claims of which the North Star is composed would be such an assault upon the patent as cannot be sustained. The former ruling upon plaintiff's objection is therefore adhered to."

Golden Reward etc. Co. v. Buxton Min. Co., 79 Fed. 868. In this case, the Judge, Carland, said (p. 874):

> "It is settled that the action of the land department in issuing a patent is conclusive upon all questions of fact coming properly within the scope of its jurisdiction, and is not subject to review by any other tribunal. The question as to what were the true boundaries of the Bonanza and Silver Case was a question of fact, coming properly within the jurisdiction of the land department. Carson City Gold & Silver Min. Co. v. North Star Min. Co., 73 Fed. 597; Doe v. Mining Co., 54 Fed. 940."

See also:

St. Louis etc. Co. v. Montana etc. Co., 113 Fed. 900.

Waterloo Mining Co. v. Doe, 56 Fed. 685. In this case, Judge Ross said (p. 687):

"The patent so issued is a conclusive determination of the true location of the Oregon claim."

There is no attempt herein to collate cases excepting those wherein the rule contended for was before the Court for application.

Of course there are cases involving patents to agricultural lands which are controlled by the statute applicable to such patents. In such cases, the line as run on the ground overcomes the description in the patent, because of the statute, and hence the cases are not in point here.

Again, there are cases wherein an effort to change the description of a patent, proof of the field notes and the location of the monuments was made without objection. Such cases, likewise, throw no light upon the discussion; because, as the evidence of the field notes and monuments was admitted without objection, and both parties tried the case upon the evidence so admitted, of course the Court was not called upon to decide the admissibility of the testimony. Such a case is Resurrection Mining Company v. Fortune etc. Co., 129 Fed. 668. This was a case involving the boundaries of a lode claim. The patent was free from ambiguity. The plaintiff, however, being the grantee in the patent, introduced in evidence the field

notes of the survey for the purpose of raising an ambiguity as to the boundaries to be explained by parol evidence. Judge Sanborn in his opinion, page 671, calls attention to the fact that the plaintiff himself introduced these field notes, the other side not objecting; and the case, having been tried upon that testimony, the upper court considered the case and all the evidence introduced and decided it upon the theory upon which both parties had tried it in the court below. Judge Thayer filed a dissenting opinion in the case (p. 685), and in the opening of the dissenting opinion he explains the consideration of the proofs in the case, and of the evidence as to the field notes, by pointing out that these field notes were read in evidence without objection and that it was conceded that the case stands as though the field notes were written into the description of the patent.

There are other decisions which necessarily turn on peculiar statutes of individual states, whereby plats of surveys as filed become part of every deed of conveyance. But these cases can, of course, throw no light upon the question now under discussion.

Mr. Curtis H. Lindley of San Francisco, whose name is signed to the petition in this case, is an author of deservedly high repute. His work on Mines is a standard text book.

His conclusions are admirably stated in Sections 777 and 778, as follows:

> To the extent that we have already covered the field, it is unnecessary to do more than recapitulate the results heretofore reached as to the force and effect of this judgment.

(1) A patent for land is the highest evidence of title, and is conclusive against the government and all claiming under junior patents or title until set aside or annulled. It is not open to collateral attack;

(2) The Land Department is a tribunal appointed by Congress to decide certain questions relating to the public lands, and its decision upon matters of fact cognizable by it, in the absence of fraud or imposition, is conclusive everywhere else;

(3) The government having issued a patent cannot, by the authority of its own officers, invalidate it by the issuing of a second one for the same property;

(4) A patent may be collaterally impeached in any action, and its operation as a conveyance defeated by showing that the department had no jurisdiction to dispose of the lands; that is, that the law did not provide for selling them, or that they had been reserved from sale, or dedicated to special purposes, or had been previously transferred to others;

(5) A patent is conclusive evidence that all antecedent steps necessary to its issuance have been properly and legally taken;

(6) It is conclusive evidence of the citizenship and qualification of the patentee; and,

(7) In cases of mining patents, that all matters which might have been the subject of an adverse claim have been conclusively adjudicated in favor of the patentee. * * *

As was said by the Supreme Court of the United States, in speaking of the functions of the land department:

'Indeed, the doctrine as to the regularity and

validity of its acts where it has jurisdiction, goes so far that, if under any circumstances under the existing law a patent will be held valid, it will be presumed that such circumstances existed.'

* * *

It may be announced as a general rule that a patent is conclusive evidence as to the limits of a location, and that it cannot be assailed by showing that its actual boundaries were different from those described in the patent.

Nor are the proceedings on which its issuance was based admissible in evidence to impeach or vary it.

This rule is, of course, subject to the qualifications that where there is a variance between the calls of the patent for courses and distance and the monuments specified therein, the monuments control, where the monuments are clearly ascertained or established by a fair preponderance of evidence.

In retracing lines of a survey, the beginning point of a survey does not control more than any other point actually well ascertained."

Among other cases cited by Mr. Lindley to the point that the patent is conclusive evidence of the limits of the location, and that it cannot be assailed by showing that its actual boundaries were different from those described in the patent is Miller v. Grunsky, 141 Cal. 441, 66 Pac. 858, in which was presented the very question in the case at bar. The trial court had admitted against objection the notes of the survey and other evidence to vary the terms of the patent. We quote from the opinion as follows:

"Because of this reference in the patent to survey No. 267, defendant insisted, and the Court so ruled, that he was entitled to introduce in evidence

the original survey so numbered, with the application upon which it was based, and that, as that application referred to the application of others, he was likewise entitled to introduce those several applications, with the surveys thereto attached, and that, considering all of these papers and all of these surveys, it appeared that the inclusion in the patent of the call to the Oristimba rancho was, if not a false call, at least an uncalled for and improper insertion, which should, therefore, be disregarded. But a patent of the United States is conclusive as to the matters therein contained, and especially so as to the description of the land granted, and extrinsic evidence is not admissible to impeach or vary it, and never are the proceedings upon which the issuance of the patent was based admissible in evidence for any of the indicated purposes. Moore v. Wilkinson, 13 Cal. 478; Yount v. Howell, 14 Cal. 465; Chipley v. Farris, 45 Cal. 527; Cruz v. Martinez, 53 Cal. 239; O'Connor v. Farsher, 56 Cal. 499; Brewer v. Houston, 58 Cal. 345; Adair v. White, 85 Cal. 313, 24 Pac. 663; Heinlen v. Heilbron, 97 Cal. 101, 31 Pac. 838; Irvine v. Tarbat, 105 Cal. 237, 38 Pac. 896; Dreyfus v. Badger, 108 Cal. 58, 41 Pac. 279; Smelting Co. v. Kemp, 104 U. S. 636, 26 L. Ed. 875. In Chipley v. Farris, 45 Cal. 527, the patent was issued upon a confirmed Mexican grant, the decree of confirmation being set out in the patent. The granting clause of the patent, however, did not cover all the land that was contained in the decree of confirmation, and the patentee sought the aid of the decree so set out in the patent, to modify the granting clause of the patent. This Court held that it could not be used for that purpose, and said: 'A patent * * * is a record which binds both the Government and the claimant, and cannot be attacked by either party, except by direct proceedings instituted for that purpose. While it

stands, the claimant or those deriving title through him, will not be permitted to aver that the claim comprised other or different lands from those mentioned in the patent * * * It is contended by the plaintiffs that the survey, which is incorporated into the patent, does not accord with the decree of confirmation, and that they are entitled to rely upon the decree, which is also incorporated into the patent, for title to lands within the decree, but not within the survey. This position cannot be maintained consistently with the views already expressed as to the nature and effect of the patent. The patent purports to convey the lands described in the survey, and its scope cannot be extended, nor on the other hand can it be limited, by showing that the decree comprised a greater or less area than the survey. Nor can the claimant, * * * make out title to lands not conveyed by the patent, by the production of the proceedings which culminated in the patent. The patent, while it remains in force, conclusively determines what lands the claimant was entitled to under his claim and the decree of confirmation. The claimant can neither reform the patent nor show that it is in any respect incorrect.' In Brewer v. Houston, *supra*, the contention was the exact opposite of the one in the case at bar. Plaintiff deraigned title under a state patent, which described the land as Survey No. 433. The Court, against defendant's objection, admitted evidence that Survey No. 433 was a resurvey of Survey No. 126, and so admitted Survey 126. In that survey the first call read 'running thence east 38.35 chains to Old River.' If the latter words were to be read as part of the description, the plaintiff was entitled to recover, but otherwise not; and plaintiffs claim there was that the italicized words had been omitted from the patent by mistake, just as in this case it is insisted that the call 'to the

> Oristimba rancho' was inserted by mistake. This Court, confirming a judgment of non-suit, said: 'If a mistake was made in failing to insert a description in the patent, we cannot see how it can be corrected in this action.' So, here, we say that if a mistake was made by inserting an erroneous call in the patent, we fail to see how it can be corrected upon this collateral attack."

A large part of petitioner's brief is devoted to an argument to the effect that the land department had no jurisdiction to award by sale the premises described in the Conkling patent, and that a portion of them, to-wit, the westerly 135.5 feet, should be held to belong to the petitioner as owner of the Silver Hill No. 4 and Custer No. 2 claims. It is entirely consistent with the argument made that at some future time it might be claimed that the patent of the Conkling is void to the entire extent of the conflict between that location as patented and the Silver Hill No. 4. It will be seen from the plat attached to the petition that such conflict includes much more than the 135.5 feet of the Conkling.

The argument of petitioner invites this Court to overrule a long line of decisions which have settled the law so that for years there has been no serious dispute. Mr. Lindley states it admirably in his work from which we quote:

> "The issue of a patent to the applicant is equivalent to a determination by the United States in an adversary proceeding, to which the owner of the adverse right is in contemplation of law a party, that the applicant's and patentee's rights were superior, and those which might have been as-

serted by the holder of the adverse title were valueless.

In other words, all matters which might have been tried under the adverse proceedings are treated as adjudicated in favor of the applicants, and all controversies touching the same are to be held as fully settled and disposed of, as though judgment had been regularly rendered in their favor.

Where there is any surface conflict whatever and there is a failure to adverse, the issuance of the patent operates as a conclusive determination of priority in favor of the patentee as to the conflict area."

3 Lindley Mines, Sec. 742.

The argument of petitioner is in every way inconsistent with the foregoing.

3. *The Act of Congress of 1904, by which it was provided as above mentioned, that the line as run by the Surveyor over mineral lands, should control over the courses and distances of the patent in case of conflict, was not intended to have any retroactive effect. If this Act of Congress was intended to have retroactive effect, it is unconstitutional and void, because it would constitute a taking of property without due process of law, in violation of the fifth amendment of the Constitution of the United States.*

We shall not discuss the question whether the Act of 1904 was intended by Congress to apply only to the future, or was intended to be retroactive, since it is clear that the constitutional provision would prevent the statute from being valid, if it was considered to be retroactive in its effect.

The patent to the Conkling claim was issued by the Government on February 23d, 1892. (See Supp. Trans. pp. 283-286.) At the time this patent was issued, it conveyed, according to the law as it then existed, to the grantee of the patent, all of the lands described in the patent. At the time this patent was issued and delivered and recorded, there was taken out of the public lands of the United States, the precise tract described in the patent, and this tract became the absolute property of the patentee. No power existed in Congress to thereafter pass any law which would take from the patentee, any of the lands which had been conveyed to him by the patent. This could not be done by Congress directly, by any act attempting to transfer title to any portion of the tract from the patentee, nor can it be done by Congress indirectly by changing a remedy or the rules of evidence.

Counsel for petitioner claim that Congress had the right to change the rules of evidence and thereby narrow the effect of the patent; but this contention is entirely unfounded. The patent was issued in 1892. The rights of the patentee were established in that year. The power of Congress to change a remedy does not extend to a change which would take away a vested and substantial right of a party; as the property rights of the patentee were in 1892 on the delivery of the patent, those of an owner in fee of the land described in the patent, it is clear that Congress could not, by any legislation in 1904, divest a patentee of the ownership of title to any portion of the land conveyed to him in 1892. This is abundantly established by the authorities.

Sinking Fund Cases, 99 U. S. 700. In this case the Court said (pages 718-719):

> "The United States cannot any more than a State interfere with private rights, except for legitimate governmental purposes. They are not included within the constitutional prohibition which prevents states from passing laws impairing the obligation of contracts, but equally with the states they are prohibited from depriving persons or corporations of property without due process of law. They cannot legislate back to themselves, without making compensation, the lands they have given this corporation to aid in the construction of its railroad. Neither can they by legislation compel the corporation to discharge its obligations in respect to the subsidy bonds otherwise than according to the terms of the contract already made in that connection. The United States are as much bound by their contracts as are individuals. If they repudiate their obligations, it is as much repudiation, with all the wrong and reproach that term implies, as it would be if the repudiator had been a State or a municipality or a citizen. No change can be made in the title created by the grant of the lands, or in the contract for the subsidy bonds, without the consent of the corporation. All this is indisputable."

Smith v. Cleveland, 17 Wis. 556. In this case the Court said (p. 568):

> "And this we think to be the sound rule upon the subject; that whatever the parties are authorized to and do stipulate for at the time of making the contract, or whatever provisions of law are then in force regulating the contract, either as to its construction or legal effect, or materially advantageous to one party, or disadvantageous to the other, as to all such the legislature has no

power afterwards to interfere to change or modify the rights and relations thereby established. The deed in question was executed on the 27th of November, and recorded on the 1st of December, 1858. At that time the title of the purchaser was valid and absolute as against the irregularities now urged, and remained so until the 19th day of March, 1859. Courts of justice must so have decided had the case then arisen. This was a most material and important advantage to the purchaser, and could not have escaped his attention. It concerned the life and validity of the contract. Could the legislature afterwards step in and take it away, and thus remove the foundation of his right?

"Can the legislature say, as to contracts past and executed, that they shall mean one thing to-day and another tomorrow? That they shall have one construction or effect at the time of execution, and another afterwards? That the title of the purchaser by deed at first indefeasible shall afterwards be defeasible? If these things can be done, then certainly the protection afforded by the constitution to private rights is very slight and inadequate. But, as has already been often decided, the legislature is deprived of this power. The construction and effect given by law to a contract at the time of its execution inhere in and continue a part of it ever after, so that no future legislature can impair the obligations or divest the rights thus created. By this rule, then, the claims of the respective parties must be judged. They must stand or fall by the law as it existed at the time of the execution and recording of the tax deed."

Webster v. Cooper, 14 Howard 488. In this case the Court said (page 503):

"The Supreme Court of Maine held, that so far

as this Act attempted to change the law of disseisin in respect to titles existing w en it was passed, the Act was inoperative and void, because in conflict with the Constitution of that State. The opinion of the Court, delivered by Mellen, Chief Justice, contains an elaborate and searching analysis of the subject, and it is evident, that learned Court considered it with all the care demanded by a question of so much delicacy and importance, and brought to its adjudication sound principles of constitutional jurisprudence. The principles of this decision have been recognized in subsequent cases, (Oriental Bank v. Freeze, 18 Maine Rep. 109; Austin v. Stevens, 24 Maine Rep. 520; Preston v. Drew, 5 Law Reporter 189), and we are not aware that it has ever been questioned, or denied to be a just exposition of the constitutional law of that State. The result of the decision is, that the constitution of the State has secured to every citizen the right of 'acquiring, possessing and enjoying property;' and that, by the true intent and meaning of this section, property cannot, by mere act of the legislature, be taken from one man and vested in another directly; nor can it, by the retrospective operation of law, be indirectly transferred from one to another, or be subjected to the government of principles in a court of justice, which must necessarily produce that effect."

Green v. Biddle, 8 Wheaton 1. In this case the Court said (pages 75-76):

"Nothing, in short, can be more clear, upon principles of law and reason, than that a law which denies to the owner of land a remedy to recover possession of it, when withheld by any person, however innocently he may have obtained it; or to recover the profits received from it by the occupant; or which clogs his recovery of such possession and profits, by conditions and restrictions

tending to diminish the value and amount of the thing recovered, impairs his right to, and interest in, the property. If there can be no remedy to recover the possession the law necessarily presumes a want of right to it. If the remedy afforded be qualified and restrained by conditions of any kind, the right of the owner may indeed subsist, and be acknowledged, but it is impaired, and rendered insecure, according to the nature and extent of such restrictions.

A right to land essentially implies a right to the profits accruing from it, since, without the latter, the former can be of no value. Thus, a devise of the profits of land, or even a grant to them, will pass a right to the land itself. (Shep. Touch. 93 Co. Litt. 4 b.) 'For what,' says Lord Coke in this page, 'is the land, but the profits thereof?' "

Southern Pacific R. Co. v. Orton, 32 Fed. Rep. 457.

In this case, it was said by the Court (page 479):

"So far as the rights of the United States are concerned, the words of grant in the Act of Congress, 'there be and hereby is granted,' are words of present grant, and pass the title out of the United States—at least the equitable title—only to be defeated by failure to perform the conditions subsequent. The right to so much land vested at the date of the passage of the Act, and attached to the specific land at the moment of filing the plat as provided in the act. This is thoroughly settled by a long line of decisions. Schulenberg v. Harriman, 21 Wall. 60; Railroad Co. v. U. S., 92 U. S. 741; Railroad v. Smith, 9 Wall. 95; Ryan v. Railroad Co., 5 Sawy. 262, 99 U. S. 383; Railroad Co. v. Dyer, 1 Sawy. 641; Knevals v. Hyde, 20 Alb. Law J. 370; Van Wyck v. Knevals, 106 U. S. 360, 1 Sup. Ct. Rep. 336.

After the right vested, Congress itself could not affect it by legislature. It could only be di-

vested by failure to perform the conditions and proper proceedings to revest the title in the government. These lands were absolutely and unconditionally withdrawn from pre-emption by the Act of Congress itself, proprio vigore, without any other act or notice, upon filing the plat, and the right to the land vested in defendant before the passage of the resolution."

Marx v. Hanthorn, 30 Fed. 579. In this case the Court said (page 587):

"The legislature cannot, under pretense of prescribing rules of evidence, preclude a party from making proof of his right by arbitrarily and unreasonably declaring that, on some particular circumstances being shown by the other, the controversy is closed by a conclusive presumption in favor of the latter. Cooley, Const. Lim., 368:

'It was held in Smith v. Cleaveland, 17 Wis. 556, that a tax deed executed under a statute which made it conclusive evidence of the regularity of the prior proceedings, with certain exceptions, could not, by a subsequent statute, be reduced to mere prima facie evidence of such facts. The decision was based on the ground that to allow the character and effect of the deed, as a muniment of title, to be changed by the subsequent statute, would impair the obligation of the contract made by the state with the purchaser. And no case has been shown in which there was a contrary ruling on like circumstances."

Von Hoffman v. City of Quincy, 4 Wallace 535. In this case, the Court said (page 550 et seq.):

"It is also settled that the laws which subsist at the time and place of the making of a contract, and where it is to be performed, enter into and form a part of it, as if they were expressly referred to or incorporated in its terms. This principle embraces

alike those which affect its validity, construction, discharge and enforcement. Illustrations of this proposition are found, in the obligation of the debtor to pay interest after the maturity of the debt, where the contract is silent; in the liability of the drawer of a protested bill to pay exchange and damages, and in the right of the drawer and indorser to require proof of demand and notice. These are as much incidents and conditions of the contract as if they rested upon the basis of a distinct agreement.

In Green v. Biddle, the subject of laws which affect the remedy was elaborately discussed. The controversy grew out of a compact between the States of Virginia and Kentucky. It was made in contemplation of the separation of the territory of the latter from the former, and its erection into a state and is contained in an Act of the legislature of Virginia passed in 1789, whereby it was provided 'that all private rights and interests within' the District of Kentucky 'derived from the laws of Virginia prior to such separation shall remain valid and secure under the laws of the proposed state, and shall be determined by the laws now existing in this state.' By two Acts of legislature of Kentucky, passed respectively in 1797 and 1812, several new provisions relating to the consequences of a recovery in the action of ejectment—all eminently beneficial to the defendant, and onerous to the plaintiff were adopted into the laws of that state. So far as they affected the lands covered by the compact, this court declared them void. It was said: 'it is no answer that the Acts of Kentucky now in question are regulations of the remedy, and not of the rights to the lands. If these Acts so change the nature and extent of existing remedies as materially to impair the rights and interests of the owner, they are just as much in violation of the compact as if they overturned his rights and interests.'

In Bronson v. Kinzie, the subject was again fully considered. A mortgage was executed in Illinois containing a power of sale. Subsequently, an act of the legislature was passed which required mortgaged premises to be sold for not less than two-thirds of their appraised value, and allowed the mortgagor a year after the sale to redeem. It was held that the statute, by thus changing the pre-existing remedies, impaired the obligation of the contract, and was therefore void.

In McCracken v. Hayward, the same principle, upon facts somewhat varied, was again sustained and applied. A statutory provision that personal property should not be sold under execution for less than two-thirds of its appraised value was adjudged, so far as it affected prior contracts, to be void, for the same reason.

In Sturges v. Crowninshield, the question related to a law discharging the contract. It was held that a state insolvent or bankrupt law was inoperative as to contracts which existed prior to its passage.

In Ogden v. Saunders, the question was as to the effect of such a law upon a subsequent contract. It was adjudged to be valid, and a discharge of the contract, according to its provisions was held to be conclusive.

A statute of frauds embracing a pre-existing parol contract not before required to be in writing would affect its validity. A statute declaring that the word ton should thereafter be held, in prior as well as subsequent contracts, to mean half or double the weight before prescribed, would affect its construction. A statute providing that a previous contract of indebtedness may be extinguished by a process of bankrutpcy would involve its discharge, and a statute forbidding the sale of any of the debtor's property, under a judgment upon such a contract, would relate to the remedy.

It cannot be doubted, either upon principle or

authority, that each of such laws passed by a state would impair the obligation of the contract, and the last mentioned not less than the first. Nothing can be more material to the obligation than the means of enforcement. Without the remedy the contract may, indeed, in the sense of the law, be said not to exist and its obligation to fall within the class of those moral and social duties which depend for their fulfillment wholly upon the will of the individual. The ideas of validity and remedy are inseparable, and both are parts of the obligation which is guaranteed by the Constitution against invasion. The obligation of a contract 'is the law which binds the parties to perform their agreement.' The prohibition has no reference to the degree of impairment. The largest and least are alike forbidden. In Green v. Biddle, it was said: 'The objection to a law on the ground of its impairing the obligation of a contract can never depend upon the extent of the change which the law effects in it. Any deviation from its terms by postponing or accelerating the period of performance which it prescribes, imposing conditions not expressed in the contract, or dispensing with those which are, however, minute or apparently immaterial in their effect upon the contract of the parties, impairs its obligation. Upon this principle it is that if a creditor agree with his debtor to postpone the day of payment, or in any other way to change the terms of the contract, without the consent of the surety, the latter is discharged, although the change was for his 'advantage.' One of the tests that a contract has been impaired is that its value has, by legislation, been diminished. It is not, by the Constitution, to be impaired at all. This is not a question of degree or cause, but of encroaching, in any respect, on its obligation—dispensing with any part of its force."

Edwards v. Kearzey, 96 U. S. 595. In this case, the Court said (page 600):

> "The obligation of a contract includes everything within its obligatory scope. Among these elements nothing is more important than the means of enforcement. This is the breath of its vital existence. Without it, the contract, as such, in the view of the law, ceases to be, and falls into the class of those 'imperfect obligations,' as they are termed, which depend for their fulfillment upon the will and conscience of those upon whom they rest. The ideas of right and remedy are inseparable. 'Want of right and want of remedy are the same thing.' 1 Bac. Abr. tit. Actions in General, letter B."

Brine v. Ins. Co., 96 U. S. 627. In the opinion of the Court in this case, it was said (pages 637-639):

> "At all events, the decisions of this Court are numerous that the laws which prescribe the mode of enforcing a contract, which are in existence when it is made, are so far a part of the contract that no change in these laws which seriously interfere with that enforcement are valid, because they impair the obligation within the meaning of the Constitution of the United States. Edwards v. Kearzey, supra, p. 595. That this very right of redemption, after a sale under a decree of foreclosure, is a part of the contract of mortgage, where the law giving the right exists when the contract is made, is very clearly stated by Mr. Chief Justice Taney, in the case of Bronson v. Kinzie, 1 How. 311. That case was one which turned on the identical statute of Illinois which is invoked by the appellant in this case. The mortgage, however, on which that suit was founded was made before the statute was passed; and the Court held, that, because the statute conferred a new and ad-

ditional right on one of the parties to the contract, which impaired its obligation, it was for that reason forbidden by the Constitution of the United States, and void as to that contract. But the Chief Justice, in delivering the opinion, further declared, that, as to all contracts made after its enactment, the statute entered into and became a part of the contract, and was therefore valid and binding in the Federal courts as well as those of the state. As it is impossible to state the case and the doctrine applicable to the case before us any better, we give the language of the Court on that occasion:

'When this contract was made,' said the Court, 'no statutes had been passed by the state changing the rules of law or equity in relation to a contract of this kind, and it must, therefore, be governed, and the rights of the parties under it measured by the rules above stated. They were the laws of Illinois at the time, and, therefore, entered into the contract, and formed a part of it, without any express stipulation to that effect in the deed. Thus, for example, there is no covenant in the instrument giving the mortgagor the right to redeem by paying the money after the day limited in the deed, and before he was foreclosed by the decree of the Court of Chancery; yet no one doubts his right or his remedy; for, by the laws of the State then in force, this right and this remedy were a part of the law of the contract, without any express agreement of the parties.' Speaking of the law now under consideration, he said: 'This law gives to the mortgagor and to the judgment creditor an equitable estate in the premises, which neither of them would have been entitled to under the original contract; and these new interests are directly and materially in conflict with those which the mortgagee acquired when the mortgage was made.'

'Mortgages made since the passage of these laws must undoubtedly be governed by them, for every state has the power to prescribe the legal and equitable obligations of a contract to be made and executed within its jurisdiction. It may exempt any property it thinks proper from sale for the payment of a debt and may impose such conditions and restrictions upon the creditor as its judgment and policy may dictate. And all future contracts would be subject to such provisions, and they would be obligatory on the parties in the courts of the United States, as well as in those of the state.'

In Clark v. Reyburn (8 Wall. 318), the Court, in recognition of the doctrine that the statute becomes a part of the contract, uses this language: 'In this country, the proceeding in most of the states, and perhaps in all of them is regulated by statute. The remedy thus provided, when the mortgage is executed, enters into the convention of the parties, in so far that any change by legislative authority which affects it substantially, to the injury of the mortgagee, is held to be a law "impairing the obligation of the contract" within the meaning of the provision of the Constitution upon the subject.'"

The Patent is a Contract.

A patent of land is the deed of the government (U. S. v. Mullan, 10 Fed. 785-792). It is the instrument by which the government passes its title. (Hayner v. Stanley, 13 Fed. 217-223.) In an action in which the legal title is involved, the patent, when regular on its face, is conclusive (Redfield v. Parks, 132 U. S. 239). The patent is the highest evidence of title and is conclusive as against the government and all claiming under junior patents or titles until it is set aside or annulled by some

judicial tribunal. (U. S. v. Stone, 2 Wallace 525-535.) When land has been sold by the United States and purchase price paid, it becomes segregated from the body of the public lands and is no longer the property of the government, but is the property of the purchaser.

Carroll v. Lafford, 3 How. 460;
Witherspoon v. Duncan, 4 Wall. 216;
Wirth v. Bronson, 98 U. S. 118;
Simmons v. Wagner, 101 U. S. 260;
Moore v. Robbins, 96 U. S. 530.

4. *The trial court entirely misconceived the significance of the lot number, as stated in the patent.*

The learned trial court, as his opinion shows, held that evidence consisting of the field notes of the survey of the Conkling claim, and testimony as to monuments, was admissible to vary the terms of the description as contained in the patent, because the patent conveyed the claim by number. The language of the opinion is (page 258 of record):

> "The patent purports to convey Lot No. 689 as designated by the Surveyor General, and the description by metes and bounds, is but an attempt to properly describe this lot. Now, if in applying this description to the ground, it be found that there is a conflict between the position of the lot as so designated and the ground included, by giving effect to the call for distance an ambigpity at once arises, and it arises not by importing into the patent what is not called for, but from the mere ascertainment of the meaning of the patent calls. In view of this conflict which call is to prevail? The survey and official marking of the lot is preliminary to the application for patent. The notice

> given to adverse claimants is of a claim to the ground so marked. The intent to convey by patent that ground and only that ground is apparent. This is the ordinary rule where land is described by an official lot number and by metes and bounds varying therefrom."

It is quite manifest that the trial court, in holding that the mention of the lot number in the patent, gave the right to introduce evidence as to the survey and monuments to vary the courses and distances in the patent, lost sight entirely of the distinction in the principles of law which apply to patents for mineral lands, which distinction we have heretofore pointed out.

The trial court overlooked entirely, a fact proven by the evidence in the case, which completely eliminates the claim that the lot number in this patent, bears reference to land theretofore surveyed and platted.

The lot number given to this claim has no more significance than the name given to the claim. This particular claim is named "the Conkling Mining Claim." The lot number given to the claim, is 689.

Both the *name* and the lot number given to the claim were given before any survey was made of the claim; and neither the lot number nor the name of the claim had any relation to the boundaries thereof.

When the application was made for the survey and before the survey was made, in the order directing the mineral surveyor to make the official survey of this claim, the lot number of the claim was given. The order was as follows (page 157 of Record):

"DEPARTMENT OF THE INTERIOR,
U. S. Surveyor General's Office.
SALT LAKE CITY, UTAH, Nov. 11, 1889.

A. Jessen, U. S. Mineral Surveyor.

SIR: You are hereby directed to make official survey and return of the Conkling Mining Claim, located in Uintah Mining District, Utah, at the expense of the claimant. The lot number for said claim is 689. You will make connection by actual measurement with the nearest corner, of any conflicting or adjoining claim surveyed for U. S. Patent and with Mineral Monument.

You will make said survey strictly in accordance with the law and instructions and return the same to this office within thirty days from the date of this order or show cause for delay.

ELLSWORTH DAGGETT,
U. S. Surveyor General.
By G. P. NORTON,
Chief Clerk."

Inasmuch as it is beyond question that the lot number was given to this claim before any official survey of the claim was made, there is no foundation for the theory that because the number is incorporated in the patent, therefore the plain and unambiguous description of the patent may be attacked by evidence as to the survey.

As we have said, all the preliminary proceedings in the matter of the applications for patent to mineral lands, were for the purpose of enabling the land department to decide what land the claimant was entitled to receive; and the patent of the government was the final determination of the fact by competent authority and the conveyance thereby effected cannot be modified upon any collateral attack.

5. *The claim of petitioner that the word "Corner" in the patent constitutes a reference to a monument, is without foundation.*

Counsel for petitioner in their brief, argue that because the boundaries of the land conveyed in the patent to the Conkling claim are defined by running from corner No. 2 westerly at a certain course, a distance of 1,500 feet to corner No. 3, thence southwesterly a certain course 600 feet to corner No. 4, thence easterly a certain course 1,500 feet to corner No. 1, the Court must assume that the expressions "corner number 3" and "corner number 4" mean a post set in the ground. The lower court refused to adopt this contention, holding that corner called merely for an abrupt change in direction.

But the patent itself is a complete answer to the claim of counsel. The patent locates corner number 1 of the claim and corner number 2, and in these instances refers to posts set in the ground as monuments to mark these particular corners. No such monuments are, as was said, referred to in connection with corner number 3 or corner number 4. Thus the patent furnishes its own rule of construction. By mentioning in connection with certain corners, monuments which mark the same, the patent shows that it did not treat the word "corner" as including or embodying a reference to a monument.

The Circuit Court of Appeals of the Eighth Circuit has passed upon this question, and decided that the mere mention of a corner without reference to monuments, in the patent, does not bring the monument within the patent.

In Resurrection Gold Mining Company v. Fortune Gold Mining Company, 129 Fed. 668, that Court said (p. 672):

> "The patent in the case before us disclosed no ambiguity and presented no conflict between its courses and distances and any monument for which it called at corner No. 3, because it specified no monument at that corner. There was therefore no excuse for parol evidence on the face of the patent, and the courses and distances which it contained were prima facie controlling and consistent with themselves."

6. *Reply to Petitioner's Argument Concerning the Jurisdiction of the Land Department.*

In petitioner's main brief, filed with its application for writ of certiorari, and also in the supplemental brief filed by Mr. Prentiss as *amicus curiae*, it is urged with much insistence that the evidence as to the positions of the survey stakes was both competent and material for the reason that the jurisdiction of the land department was limited to the tract so staked and that therefore such evidence was necessary for the purpose of identifying the tract to which jurisdiction had attached by reason of the survey and the application for patent.

As a background for this argument an allegation in respondent's amended Bill of Complaint to the effect that the patent issued for the Custer No. 2 and Silver Hill No. 4 claims was based upon location notices antedating the location of the Conkling (Amended Complaint, paragraph 14, Record p. 12,) is seized upon and without further argument treated as proof or an admission of the fact that the Custer No. 2 and Silver Hill No. 4 were

valid and subsisting locations at the date of the location of the Conkling claim and continued to be such and superior in right to the Conkling claim until the issuance of the Conkling patent; so that, as argued, the owners of these claims would necessarily have succeeded in an adverse suit against the Conkling applicant had they seen fit to adverse.

Proceeding on this assumption the argument is made that the owners of the Custer No. 2 and Silver Hill No. 4 claims could not be deprived of any part of the ground embraced within such prior locations unless the ground itself were first seized by being staked and posted with a notice. That if evidence were not admissible as to the extent of the ground so seized and the position of the stakes, the owners of the Custer No. 2 and Silver Hill No. 4 would be deprived of property without due process.

In the first place, for the purpose of illustrating the lack of substantial basis for this argument, attention is called to the allegation in the complaint, upon which the same is predicated. This allegation reads as follows: (Record, p. 12.)

> "That said Custer No. 2 and Silver Hill No. 4 lode mining claims, Survey 4850, were, by letters patent dated June 2, 1904, granted from the United States of America to the Belmont Mining Company. That said patent was based upon location notices antedating the location of said Conkling lode mining claim."

If nothing more appeared and it became essential to determine the effect of this allegation as an admission, under the rule that pleadings are to be most strongly con-

strued against the pleader, it might well be that the allegation would be construed to mean that the location notices of both the Custer No. 2 and Silver Hill No. 4 bore an earlier date than the location notice of the Conkling.

In this case, however, it is not necessary to apply technical rules of pleading. Both the patent and the field notes of these claims were introduced in evidence by the petitioner. (Exhibit T and Exhibit Y.) The patent shows that it was a so-called group patent and embraced ten claims. The field notes show (Exhibit Y) that of these ten claims the location notices of eight bore date prior to that of the Conkling location, while the remaining two, of which the Silver Hill No. 4 was one, were located subsequently to the location of the Conkling claim. This fact was also noted by petitioner on its map of claims (Exhibit B), whereon the date of location of the Conkling is given as June 20, 1888; that of the Silver Hill No. 4 as January 14, 1889. It is thus apparent that in so far as petitioner's argument requires the assumption of priority of location for these conflicting claims, it has no basis whatever in so far as the area in conflict with the Silver Hill No. 4 is concerned.

It also has no substantial or legal basis as addressed to the area in conflict with the Custer No. 2. It is not necessary to call the attention of this court to the fact that it does not necessarily follow from the mere priority in date as between two location notices that the location under the one of prior date is the superior in right. There are many things to be complied with by a locator in establishing a valid location, of which the posting of a notice

is but one, and after the location is perfected further acts and labor are essential to keep the claim alive as against adverse claimants. But it is unnecessary to discuss this proposition further. The record discloses that the Conkling claim was patented in 1892 and, even with the shortened boundary shown on Exhibit B embraced a considerable portion of the area contained within the lines of the Custer No. 2 and Silver Hill No. 4. These latter claims were patented in 1904 and in their patent the conflict area was expressly excluded in favor of the Conkling.

Under these circumstances the superiority of the Conkling is conclusively established. The owners of the Custer No. 2 and Silver Hill No. 4 having failed to adverse, the present owner of these claims cannot now assert that they must have been successful had they seen fit to do so.

3 Lindley on Mines, Section 742;

Gwillim v. Donnellan, 115 U. S. 45, 29 L. Ed. 348.

As the record stands, it is apparent that this background argument of the petitioner, in so far as it presupposes subsisting valid locations of the Custer No. 2 and Silver Hill No. 4, either at the time of the location or of the patenting of the Conkling claim, has no substantial foundation.

As we understand petitioner's main argument, however, it is not primarily based on this assumption, but goes further and in fact amounts to the assertion that in all cases the jurisdiction of the land department over mineral lands is a jurisdiction in rem analogous to the

jurisdiction of the courts in proceedings of that character and that its jurisdiction in all such cases is dependent upon the presence of certain essential elements of jurisdiction; namely, *an application, seizure and due notice.*

We quote from petitioner's brief in support of its application for the writ of certiorari: (Pages 38-39.)

> "Our contention is that the land department cannot acquire jurisdiction to convey to B a valid location which belongs to A, unless it first seizes or takes possession of A's claim, or some part of it, and then gives notice to the world in the manner prescribed by law that the property is claimed, and a patent is sought for it by B.
>
> "The property is seized and taken into possession of the land department by surveying it, putting up monuments to mark its boundaries, and posting upon it a notice that it has been thus seized and is to be conveyed to him who is seeking to purchase it, unless persons who have an adverse claim to it shall, within the time allowed by law, make their claims known. * * *
>
> "All this we concede; but we insist that the land office has no jurisdiction to convey anything except what it *has seized and taken possession of;* and it has seized and taken possession of nothing except that area of ground which *has been segregated from the public domain by being surveyed and having its boundaries officially marked and a notice posted on it.*"

In petitioner's "Additional Brief on the Question of Boundaries," at pages 41 and 45, counsel further state their position as follows:

> "We say further, that the department had no jurisdiction or power to grant or issue a patent for 1500 feet in length unless the claim as surveyed and monumented equaled that length—it had no juris-

> diction to award a patent for any territory which was not included within the official survey of the claim. * * *
>
> Now, seizure of the property; or taking possession by the Court or other tribunal of the res is indispensable to the jurisdiction of the Court or other tribunal.
>
> 'Let it never be questioned that proceedings in rem are void *ab initio* without seizure sufficient; that there is no reliable decision, and can be none to the effect that insufficient seizure can be cured by anything less than the making of it sufficient.'
>
> WAPLES on Proceedings *in rem*, Sec. 42."

In short, it is contended that any error or defect in the seizure, or in other words, the survey and the posting of notice, is jurisdictional and fatal.

The only authorities cited by petitioner in support of this characterization of or limitation upon the jurisdiction of the Land Department are 3 Lindley on Mines, Sec. 713, wherein the author in speaking of adverse claims states that patent proceedings are "essentially in rem," and the language of this court in the case of El Paso Brick Company v. McKnight, 233 U. S. 250, to the effect that entry by the issuance of a final receipt is "in the nature of a judgment in rem."

We do not believe that either this Court or Mr. Lindley in thus characterizing patent proceedings as being essentially or in the nature of proceedings in rem had the remotest idea of implying the analogy contended for between the jurisdiction of the Land Department over public lands and the jurisdiction of a court of law over private property which may by actual seizure be brought under its control. Such a construction of the powers of the

land department would put a limitation upon its jurisdiction which in so far as we are aware has never been before suggested and which would be contrary to the rulings of this court in cases without number.

If the jurisdiction of the land department were thus limited it would of necessity follow that in each and every case the decisions of that tribunal and patents issued pursuant thereto could be collaterally assailed upon a mere showing of a defect in the seizure of the tract conveyed, which seizure, as defined by counsel, consists of "surveying it, putting up monuments to mark its boundaries and posting upon it a notice that it has been thus seized." If such be the jurisdiction of the land department each and every patent ever issued by it is subject to impeachment at any time upon a showing either that the officer who made the survey made a false or an erroneous return in that the boundaries were not actually marked or that such markings as were made were insufficient to distinctly mark its limits, or that the required notice was never posted upon the claim, or that its posting was defective.

If this theory as to the limitations under which the land department exercises jurisdiction in disposing of the public domain is correct, patents, instead of being most solemn assurances of title, are mere *indicia* of ownership, the vulnerability of which invites attack.

That the jurisdiction of the land department is not thus limited cannot be questioned. It is the executive department of the government, specially charged with the custody and disposal of public lands. It derives its jur-

isdiction over them by legislative enactment and not judicial process.

R. S. Section 453, U. S. Compiled Statutes Annotated 1916, Section 699;

R. S. Section 2478, U. S. Compiled Statutes Annotated 1916, Section 5120;

Burke v. Southern Pacific, 234 U. S. 669; 58 L. Ed. 1527;

Quinby v. Conlan, 104 U. S. 420; 26 L. Ed. 800;

Orchard v. Alexander, 157 U. S. 372; 39 L. Ed. 737;

Kirwan v. Murphy, 189 U. S. 35; 47 L. Ed. 698;

Steel v. Smelting Company, 106 U. S. 447; 27 L. Ed. 226;

Smelting Company v. Kemp, 104 U. S. 636; 26 L. Ed. 875;

Catholic Bishop v. Gibbon, 158 U. S. 155; 39 L. Ed. 931.

The decisions of the land department rendered in the exercise of its jurisdiction thus conferred are final upon matters properly before it and are not subject to attack except in a direct proceeding for mistake or fraud.

> "That department, as we have repeatedly said, was established to supervise the various proceedings whereby a conveyance of the title from the United States to portions of the public domain is obtained, and to see that the requirements of different Acts of Congress are fully complied with. Necessarily, therefore, it must consider and pass upon the qualifications of the applicant, the acts he has performed to secure the title, the nature of the land, and whether it is of the class which is

open to sale. Its judgment upon these matters is that of a special tribunal, and is unassailable except by direct proceedings for its annulment or limitation. Such has been the uniform language of this court in repeated decisions."

Steel v. Smelting Co., *supra.*

"The general doctrine declared may be stated in a different form, thus: a patent, in a court of law, is conclusive as to all matters properly determinable by the land department, when its action is within the scope of its authority; that is, when it has jurisdiction under the law to convey the land. In that court the patent is unassailable for mere errors of judgment. Indeed, the doctrine as to the regularity and validity of its acts, where it has jurisdiction, goes so far that if in any circumstances under existing law a patent would be held valid, it will be presumed that such circumstances existed."

Smelting Company v. Kemp, *supra.*

Quinby v. Conlan, *supra;*

3 Lindley on Mines, 3d Ed., Sec. 777.

An analysis of petitioner's argument on this question shows that it necessarily presupposes a lack of authority on the part of the department to adjudicate or determine the boundaries of any claim. If petitioner's contentions are correct the most that the land department could ever do upon an application for patent would be to determine that the applicant was entitled to a conveyance from the government covering a parcel of land of uncertain location and in so far as the department was concerned of undeterminable boundaries but which would be found staked off upon the ground in a certain general locality. Such a determination would and could not even

be conclusive of the fact that there was a tract so staked, and should the question ever arise as to whether, or where the stakes had been set, such question would have to be determined anew in each case in which it might be broached upon whatever evidence was then obtainable.

The foregoing is not only the logical conclusion from petitioner's hypothesis, but it is the contention expressly urged.

We quote from the brief of Mr. Prentiss, filed in support of the petition for writ of certiorari, p. 11:

> "That it is only when official corner monuments and witness objects have disappeared or are in doubt that the courses and distances function and, even then, *not as fixing the boundaries* of the 'lot,' but *merely as aids* in establishing the true positions in which the original monuments were set,"

and again, at page 29:

> "The fundamental error of the Circuit Court of Appeals is in their assumption (230 Fed., pp. 558-559), that when the Commissioner of the General Land Office, with the record sent up by the local officers before him, proceeded to perform the purely ministerial act of issuing patent, *he had power, and intended*, to adjudicate the boundaries of the ground to which the applicant was entitled. * * *"

We assert the law to be that not only was it within the power, but it was the duty of the land department to fix, determine and forever settle the boundaries of lands conveyed by patent with certainty, and this not only in the interest of the government but in the interest of the patentee as well.

Beard v. Federy, 70 U. S. 478; 18 L. Ed. 88;

Cragin v. Powell, 128 U. S. 691; 32 L. E. 566;

United States v. Maxwell Land & Grant Company, 121 U. S. 325; 30 L. Ed. 949;

Stoneroad v. Stoneroad, 158 U. S. 240; 39 L. Ed. 966;

Knight v. United Land Association, 142 U. S. 161; 35 L. Ed. 974.

The following passage is quoted from the concurring opinion of Mr. Justice Field in the case last cited:

"From the opinions upon both affirmances it appears that the court below, equally with the referee, lost sight of the principle that in actions at law a patent of the United States, upon a confirmation of a private land claim asserted by virtue of rights acquired under a foreign government, is not open to collateral attack, but must be taken as correct until vacated, not only as to the validity of the claim confirmed, but as to the boundaries established. It is hardly necessary to say that any attempt to overthrow these conclusions in either particular, where the tribunal affirming the validity of the claim and the department establishing the boundaries had jurisdiction, is collaterally attacking the patent.

"That the land commissioners and the circuit court of the United States had jurisdiction to hear and determine the validity of the claims asserted by the city of San Francisco is not open to question. The laws of the United States gave them such jurisdiction, and when that claim was confirmed the law directed by what officers its boundaries should be established and surveyed. It was the exclusive province of those officers to ascertain where the line of true boundary ran, subject to the control and supervision of the Interior Department. To say that those who directed and supervised the survey had not jurisdiction to per-

form that duty, is to deny efficacy to the laws of Congress."

This rule is stated by Mr. Lindley, as follows:

"It may be announced as a general rule that a patent is conclusive evidence as to the limits of a location, and that it cannot be assailed by showing that its actual boundaries were different from those described in the patent.

"Nor are the proceedings on which its issuance was based admissible in evidence to impeach or vary it."

3 Lindley on Mines, Sec. 778.

Such being the law with reference to the power and duty of the Land Department can it be successfully urged that that tribunal, prior to the Brooks Amendment of 1904 after having determined the boundaries of the tract for which application had been made, was without authority to issue its patent conveying the claim with fixed and settled boundaries pursuant to such determination?

The law, as it stood prior to the Brooks Amendment, imposed upon the Land Department the duty of fixing the boundaries of areas segregated from the public domain and patented as mining claims. The law, as it then stood, imposed no limitation upon the Land Department by way of restricting the character of record it might make as evidencing its determination.

Acting under this law the Land Department adjudicated the right of the Boss Mining Company to a patent for the Conkling claim and adjudicated the location, dimensions, boundaries and area of that claim and in pursuance of that adjudication the patent of the govern-

ment was issued to the applicant conveying the very premises by certain and unambiguous description.

The law did not then provide, as it does now, that the stakes and not the patent should be the controlling evidence as to the adjudicated boundaries, and the Land Department in issuing this patent without called posts at corners 3 and 4 then determined, as it had a perfect right to do, that the patent calls and not the stakes were the recorded evidence of its decision. Whether the omission of calls for posts at corners No. 3 and No. 4 was intentional, arising from a realization on the part of the department of the demonstrated instability of "monuments" of this character and of the uncertainties occasioned by discordant surveys in this locality, or was merely fortuitous, as asserted by petitioner, is not material. Inasmuch as the law, as it then stood, did not give the stakes controlling force as evidence, it was not incumbent upon the Land Department for its own or the public's or the patentee's protection, to mark the corners by immutable monuments nor was it incumbent upon the department to so draw the deed that it would cast upon the patentee the duty of preserving, at all hazards, the surveyor's stakes in their original positions. The department, therefore, in this and many thousand other cases so drew the deed that it would not impose upon the patentee this obligation, and drew it moreover in such a fashion that the department in dealing with adjacent tracts could rely upon its own records, in accordance with the express directions of the statute then in force, without the necessity of re-taking evidence and re-deter-

mining the question of boundaries in each and every case in which they might be questioned.

In the brief filed by Mr. Prentiss, in support of petitioner's application for the writ, the Court's attention is called to certain land office rules governing the preparation of mineral patents which were in force in that department from 1891 until 1904. These rules as set out by Mr. Prentiss are as follows: (Italics ours.)

"DIRECTIONS FOR THE PREPARATION OF MINERAL PATENTS.

1. *Give all markings and bearings at corner No. 1 and the corner to which the claim is tied to a monument or corner of the public surveys; omit all markings and bearings at other corners.*

2. Give all intersections with lines of executed foreign surveys and give bearings to corner when one end of the line is within the location being described; omit intersections with foreign surveys not executed.

3. In cases where two or more lodes or locations are embraced in one claim and entry, the description of the claim in the patent need not, in running any line of the claim, mention the intersections with any other line of the claim, care being taken, however, to have a connection shown of each location with the M. M. or corner of public survey, to which the claim is tied, and it is not necessary that the area of each separate location be given.

4. *Each patent must be a good and sufficient description of the claim, particularly as to exclusions, without requiring a plat to be inserted by way of explanation, and no reference to such plat will be made in the patent.*

H. G. POTTER,
Chief Mineral Division, G. L. O.
April 28, 1891."

We conceive these rules to be significant. Corner posts in the mountainous regions in which mining claims are usually found are "monuments" of an exceedingly temporary and unstable character, a fact which is strikingly illustrated by the testimony in this case. (Record 84-85.) On the other hand the lines of mineral surveys are comparatively short and are run by sworn officers of the Government under regulations requiring great care and precision. The rules above set out expressly directed that all markings and bearings at the point of beginning and the corner tied to the public surveys, the two points, which form the nature of things lend themselves most readily to definite fixation, be written in the patent. They expressly required that the markings and bearings at the other corners be omitted.

It is submitted that these rules, when considered in the light of the facts above mentioned clearly indicate, on the part of the department, a reasoned policy to avoid, in so far as possible, the doubts and uncertainties which would be occasioned by treating all of the unstable survey stakes as "monuments." Moreover, they indicate most clearly that it was the intention of the land department that the description written in the patent, the final record, should be in and of itself sufficient without a reference to the plat.

Sulphur Springs Quick Silver Mine, 22 L. D. 715.

There is an implication in Mr. Prentiss's brief that these rules are repugnant to the provisions of the Revised Statutes, Sections 2325 and 2327. We submit, on the con-

trary, that they are in strict conformity therewith. We have hereofore (Ante p. 31) discussed the latter section. Section 2325 contains nothing that indicates a different meaning. In so far as pertinent it reads as follows:

> "Section 2325. A patent for any land claimed and located for valuable deposits may be obtained in the following manner: Any person, • • • having claimed and located a piece of land for such purposes, who has, • • • complied with the terms of this chapter, may file in the proper land office an application for a patent, under oath, showing such compliance, together with a plat and field notes of the claim or claims in common, made by or under the direction of the United States surveyor general, showing accurately the boundaries of the claim or claims, which shall be distinctly marked by monuments on the ground, and shall post a copy of such plat, together with a notice of such application for a patent, in a conspicuous place on the land embraced in such plat previous to the filing of the application for a patent. • • • The claimant at the time of filing this application, or at any time thereafter, within the sixty days of publication, shall file with the register a certificate of the United States surveyor general that five hundred dollars' worth of labor has been expended or improvements made upon the claim by himself or grantors; that the plat is correct, with such further description by such reference to natural objects or permanent monuments as shall identify the claim, and furnish an accurate description to be incorporated in the patent."

It will be observed that the requirements of this statute are:

First, an application showing a compliance with the law as to location, etc.

Second, a plat and field notes made under direction of the United States surveyor general, showing accurately the boundaries of the claim which shall be distinctly marked by monuments on the ground.

Third, a posting of a copy of the plat and notice of the application on the claim.

Fourth, a certificate of the surveyor general that the plat is correct and that five hundred dollars worth of work has been done. Also such a further description of the claim, with reference to *natural objects or permanent monuments,* as will identify the claim and furnish an accurate description to be incorporated in the patent.

It will further be noted that the monuments, which are to distinctly mark the boundaries of the claim at the time of the survey, are expressly distinguished from the *natural objects and permanent monuments* with reference to which the claim is to be identified in the patent description.

It is submitted that the judgment of the land department is as conclusive as to the fact that the survey monuments were set and that as set they distinctly marked the boundaries of the area ultimately patented as it is conclusive that the original location was properly marked upon the ground or that any other antecedent step in the patent proceeding was regularly taken.

These survey stakes or monuments are in no sense parmanent (Rec. p. 84) (Byrne v. Slauson, 20 L. D. 43) nor are they of such a character as to be properly classified along with natural objects as suitable stable witnesses, a reference to which would at all times serve to

identify the claim. In the judgment of the Land Department the public survey corners and mineral monuments were more certain and reliable guides. We quote from the decision of the department in the Sulphur Springs case *supra*.

> "The Merchants Exchange Bank of San Francisco * * * appeals from your office decision of April 20, 1895, requiring an amendment to the survey of the claim so as to show a connection with a corner of the public survey and a republication and posting of the notice of application for patent. * * * This survey, while making references to several large trees by courses and distances, does not connect the claim with any public survey corner.
>
> "It is important, however, to the applicant in this case, as well as to the government, that the survey of the claim give such a description, in the language of the statute (Section 2325 R. S.), by 'reference to natural objects or permanent monuments as shall identify the claim and furnish an accurate description, to be incorporated in the patent.' The patent is the effective instrument whereby title passes from the government, is the muniment upon which all parties claiming thereunder should confidently rely, and its description of the property conveyed should be as accurate as is reasonably possible. The requirement of your office to that end, as to amendment of the survey, is in pursuance of the statute, and has formed part of the circular instructions and regulations of your office under the mining laws since January 14, 1867. * * * This requirement should be complied with."

It is submitted that the action of the land department in refusing to treat the stakes as invested with characteristics they did not possess but in choosing rather to mark

upon the ground only the two corners most easily identified was not only authorized but was eminently proper.

But it is urged that in spite of this departmental practice existing from 1891 until 1904 the field notes of the survey and all of the observations of the surveyor contained therein must be treated as incorporated in the patent because the field notes are referred to in it and the claim is spoken of as Lot 689.

It will be noted that in the wording of the grant the fact that the field notes, together with other evidence, had been deposited in the Land Office, was mentioned by way of inducement merely, and were they by this reference made admissible it would follow by a parity of reasoning that all of the proceedings in the department are subject to inspection and review. As for the lot number, as we have heretofore pointed out, it is merely a convenient official name which was given before the survey to the area applied for and ultimately patented. But, if by any process of reasoning a special significance could be attached to it, the petitioner is still in no better position than before. Such significance could not possibly extend beyond a reference to the lot as platted, and the petitioner did not see fit to put the plat in evidence. It sought rather to go back of both the patent and the plat directly to the field notes in order to find something that it might use as a basis for raising a latent ambiguity and then by extrinsic evidence to control them both.

Beaty v. Robertson (Ind.), 30 N. E. 706;
Cornett v. Dixon (Ky), 11 S. W. 660;

Jones v. Johnston, 18 How. 150;
Haley v. Martin (Miss.), 38 So. 99.

Finally it is urged that it was the intent of the Land Department to grant only the area embraced within the stakes as originally set and that parol and extrinsic evidence should therefore be admitted to show first that a mistake had been made either by the surveyor or by the Land Department, and then to identify correctly the area originally marked and intended to be conveyed. We are thus invited to violate a fundamental rule of evidence in order that different courts and different juries may have an opportunity of reviewing again and again, as often as the occasion may arise, one of the very matters presented to the Land Department for its decision.

We quote from the language of Mr. Justice Field in Beard v. Federy as quoted in Knight v. Land Association, *supra*:

> "This instrument is, therefore, record evidence of the action of the government upon the title of the claimant. By it the government declares that the claim asserted was valid under the laws of Mexico; that it was entitled to recognition and protection by the stipulations of the Treaty, and might have been located under the former government, and is correctly located now, so as to embrace the premises as they are surveyed and described. As against the government, this record, so long as it remains unvacated, is conclusive. And it is equally conclusive against parties claiming under the government by title subsequent. It is in this effect of the patent as a record of the government that its security and protection chiefly lie. If parties asserting interests in lands acquired since the acquisition of the country could deny and

> controvert this record, and compel the patentee, in every suit for his land, to establish the validity of his claim, his right to its confirmation, and the correctness of the action of the tribunals and officers of the United States in the location of the same, the patent would fail to be, as it was intended it should be, an instrument of quiet and security to its possessor. The patentee would find his title recognized in one suit and rejected in another, and if his title were maintained, he would find his land located in as many different places as the varying prejudices, interests or notions of justice of witnesses and jurymen might suggest. Every fact upon which the decree and patent rests would be open to contestation. The intruder, resting solely upon his possession, might insist that the original claim was invalid, *or was not properly located*, and, therefore, he could not be disturbed by the patentee."

In the suggestions filed on behalf of the United States by the Solicitor General upon this hearing it is stated, that the amended Statute, Section 2327, "has been considered by the Land Department to have a retroactive aspect and as being declaratory of existing law and departmental practice." It is quite possible that the department, in considering cases since the passage of the Act, has construed it retroactively in accordance with certain phraseology in it which would seem to contemplate such an application. The lack of power on the part of the Land Department to give the Act such a retroactive application is discussed elsewhere in this brief. (p. 45.)

Referring to the other point, however, if it is meant by the language quoted, that the department had, prior to the passage of the amendment, construed the then existing law to authorize the identification of patented

areas by means of parol evidence as to the positions of the survey stakes without regard to the calls or the reference to such stakes in the patent, it is submitted that the decisions of the department do not seem to accord with the views of the Solicitor.

Mono Fraction, 31 L. D. 121;
U. S. v. Rumsey, 22 L. D. 101;
St. Lawrence Min. Co. v. Albion Min. Co., 4. L. D. 117.

The decision in the case last cited is particularly in point, its holding being in effect that the fact that the survey stakes had been erroneously placed, was immaterial in the absence of a showing that the official record of the survey was incorrect. As we understand these cases they show that prior to the Amendment it was the practice of the department to rely upon its records and not upon the survey posts.

See also Commissioner's letter of July 19, 1904, set out in our Motion to Dismiss the Writ.

Nor would it seem probable that the Land Department would have so specifically ruled that certain monuments should be referred to and described in the patent while others should not be mentioned if it entertained the view that the law made all of the stakes a part of the description independently of any reference to them.

Moreover, it would seem that even after the passage of the amendment the department was slow to accommodate itself to the new rule for, in the case of Sinnot v. Jewett, 33 L. D. 91, decided after the amendment was passed, the decision authorizing recourse to the survey

posts was based upon the proposition that such posts were described and referred to in the patent there in question.

These rules governing the preparation of mineral patents were in force in the department from 1891 until shortly after the passage of the amendment in 1904, when they, and certain other regulations, were changed in order to conform to the new rule introduced by the amendment. See letter of Commissioner of July 19, 1904, *supra.*

It is stated that under these rules some twenty thousand mineral patents were issued in which only one or two monuments were mentioned, depending upon whether or not corner No. 1 of the claim was the tie corner. It is now nearly thirty years since the first and over sixteen years since the last of these patents were issued. In none of them was there anything to put either the government, the patentees or third parties on notice that the survey stakes should be preserved at any corner save corner No. 1 and the tie corner.

It is submitted that a ruling at this late date to the effect that neither the government nor the patentees could rely upon these records would not only cloud all these titles but would be, in effect, an invitation to numerous actions in the courts and controversies before the land department, in an attempt to show by the sort of testimony introduced as a defense in this case that a surveyor long since deceased had not set one of his survey stakes at just the point where he reported it. Especially would this be true in districts such as this where there are dis-

cordant surveys, and survey and location stakes without number have been set, disturbed, reset, and obliterated.

It is submitted that the decision of the Circuit Court of Appeals upon the question of law as to the admissibility of the evidence introduced by the petitioner for the purpose of varying the calls of the Conkling patent is not only in strict accordance with correct principles of law but is also in accordance with the practice of the Land Department as it existed prior to the Amendment of 1904.

But the ruling of the Circuit Court of Appeals was not predicated alone upon this point of law. The evidence had been admitted, and was all before the court. It was carefully considered and the court held that it was not of that requisite, certain and satisfactory character to support a finding which fixed as boundaries for the Conkling claim, lines differing from those determined by the patent calls. It is submitted that a careful analysis of this evidence completely fails to justify any different conclusion. We present the following argument assuming for purposes of it that the evidence was properly received.

7. *Conceding the admissibility of the evidence it is entirely insufficient to establish that the original survey posts were set 135.5 feet short of their reported positions.*

In considering this question, it should be borne in mind that the Conkling claim was surveyed for patent in November, 1889, some twenty-two years before the trial of the cause, and that the original positions in which its stakes were set by the surveyor in making its survey is the only point that can upon any theory be material.

It will also be borne in mind that the claim is question, and those joining it, are located upon a mountainside in a country where "it is a usual thing to have disturbances among the posts," and where the original posts and markings of a claim are frequently removed or obliterated by the action of heavy snows and grazing sheep and cattle, and that it is the practice of surveyors in this locality where original posts have been thus obliterated, to re-establish such lost stakes or "monuments" by placing new posts, marked as the original posts were marked, at the points where it is determined or estimated that the old posts stood. The testimony of petitioner's surveyor and chief engineer upon this point is as follows (Rec., pp. 84 and 85):

> "This is a mountainous country where these claims are, and every winter is covered very deep with snow, and the effect of the snow is necessarily to interfere more or less with the posts and stakes in the ground. Posts as put in by the original surveyor are sometimes removed by the action of the snow, and in some portions this is quite frequent. Cattle and sheep also grazing about the country have some effect in disturbing these monuments and posts so that it is a usual thing to have disturbances among the posts in that region.
>
> "If I am sent out by my employer to survey a claim and find the original posts at a corner have been removed, it is my practice to put one in. It is not my practice to re-establish corners, unless I have bearing trees or some natural object to re-establish it from, but I do not say that I have never done it. That has been done by surveyors in surveying a claim to put in a post where the surveyor estimates the corner to have been, and I have done it and have known other surveyors to

do it. When this is done the post is marked as the original post was marked sometimes. I have done it when I believed I was at the correct point. There are posts and have been posts through this mountain district that are marked as the original posts put in by the official surveyor that are not the posts which the original surveyor in fact put there. I know this to be the fact in some instances."

All the evidence upon the question as to the original positions at which the surveyor placed the Conkling survey posts is found in the record, beginning at page 78 and running to page 96. It is of three classes,—first, the field notes of the Conkling and of adjoining surveys; second, the testimony of witnesses as to the finding of the Conkling and other posts; third, testimony as to the finding of bearing trees called for in the field notes of the Conkling and Pirate-King claims at their respective corners numbered 3. The following discussion treats of this evidence in order as thus classified:

Field Notes.

At the trial of the case, petitioner introduced among others the field notes of the patent surveys of the Conkling, Pirate King, Nero, Hope, Twentieth Century, San Pedro, Custer No. 2 and Silver Hill No. 4 Lode Claims. The Conkling field notes (Exhibit O) in so far as they are pertinent, read as follows:

"Thence S. 60 deg. 45 min. W. along southeasterly side line of L. 580, Pirate King lode, and northwesterly side line of this claim 1500 feet.

P. 3 of L. 580, Pirate King lode, and northwesterly cor. of this claim, both on line; said latter cor. being a pine post 4'x4"x4" firmly set; mark same U. S. 689 P. 3 for post No. 3, from which a balsam

14′ in (dia.) bears S. 4 deg .15 min. E. 28 ft. distant, and a red pine 17″ in dia. bears N. 16 deg. 15 min. E. 35 feet distant, both marked U. S. 689, P. 3, B. T."

So far as course and distance are concerned, the calls in the field notes correspond exactly with the calls in the patent, viz., South 60° 45′ West 1500 feet from corner No. 2; but, whereas the patent makes no mention of a post or monument at corner No. 3, the field notes refer to a pine post 4″x4″x4″, identify the corner as being coincident with corner No. 3 of the Pirate King, Lot 580, and refer to two bearing trees. It is undoubtedly because of this reference to markings not mentioned in the patent that the field notes were introduced.

Passing for the time being the reference to the bearing trees and the post, it is evident that if these field notes afford a criterion by which corner No. 3 of the Conkling may be located at a different spot than that determined by the calls for course and distance of both the field notes and the patent, it is because of the tie to corner No. 3 of the Pirate King, and thus it may become material to locate that corner. For this purpose petitioner introduced the field notes of the Pirate King survey. These field notes (Exhibit M) describe a claim 1500 feet long, the position of whose easterly end line is not in dispute, and the southeasterly corner of which is identical with the northeasterly corner of the Conkling. (Conkling field notes, Exhibit O.) If these field notes have by themselves any probative value, they tend to show that the Pirate King claim is 1500 feet in length, and that consequently the Conkling is of the same dimension.

It is contended, however, that this is not the fact, and attention is called to corner No. 4 of the Pirate King, which by the field notes is described as being identical with corner No. 3 of the Nero, Lot No. 192; and the field notes of the Nero were introduced to show the position of this corner. These field notes (Exhibit L) describe a claim which is 1500 feet in length, the easterly end line of which is not in dispute, and with the southeasterly corner of which the northeasterly corner of the Pirate King is identified. (Pirate King notes, Exhibit M.) So here again, if these field notes have any probative value, they show that the Nero is 1500 feet in length, and that therefore both the Pirate King and the Conkling must be of the same dimension. Moreover, by these field notes corner No. 2 of the Nero is definitely tied to corner No. 3 of the Boss, Lot No. 126, and described in the field notes as being "North 60° 45' East 33 feet from Post No. 3 of said claim by actual measurement."

The Boss claim, Lot No. 126, is correctly shown upon petitioner's map of claims, Exhibit B, being located with reference to ties from the Brave Columbia. (Rec., p. 78.) If the northwest corner of the Nero were platted on this map in the position that its field notes say it was originally placed, viz., 33 feet easterly from corner No. 3 of the Boss, instead of 168.5 feet easterly therefrom, as platted on Exhibit B, the northwest corner of the Conkling would necessarily be placed at just the position that the calls of both its field notes and its patent place it. In other words, a tie from corner No. 3 of the Conkling back through the field notes of the Pirate King and Nero

to the known, admitted and platted point, namely, corner No. 3 of the Boss, places the Conkling corner in the same position as it is placed by the patent calls.

Having introduced this evidence, petitioner sought to destroy the effect of it by the introduction of the field notes of the Hope, Lot No. 260. (Exhibit N.) This claim was surveyed for patent in May, 1882, by Joseph Gorlinski, long since deceased, and contains a tie to the westerly end line of the Nero. In the course of these field notes, the surveyor makes the following recital:

> "Thence north 12 degrees 40 minutes west along the easterly end line of this claim and the westerly end line of Nero, Lot 192, 97.64 feet, intersecting the northerly side line of Democrat, Lot 84, north 48 degrees 15 minutes east 117 feet from post 4 by calculation, 187 feet, post 2 Nero on line and intersection of southern side line of Boss lode, Lot 126, mining claim, north 69 degrees 45 minutes east 168.5 feet from post No. 5 of said claim." (Exhibit N, Rec., p. 81.)

The purpose of this evidence was to show that corner No. 2 of the Nero had not been placed 33 feet easterly of corner No. 3 of the Boss, as recited in the Nero field notes, but 168.5 feet easterly therefrom, a difference of 135.5 feet, the further contention being that such a showing necessarily shortens the lines of the Pirate King and Conkling a similar amount.

In the first place, neither the Hope claim nor any of its posts or corners are in any way referred to by either the Conkling, Pirate King or Nero field notes, and whatever may be the rule as to the admissibility of the field notes of these latter claims for the purpose of identifying

the common corners mutually referred to, it is evident that the statement of the Hope surveyor that he found a Nero post and that it was in a certain relative position to a corner of the Boss, is hearsay pure and simple.

In the second place, even could this evidence be properly received, its probative value, in view of the instability of posts in this region, is almost nil. These field notes contain no reference to the Nero southwest corner. They contain no statement as to how the post referred to as "post 2 Nero" was identified, or any description of it other than that it stood north 60° 45′ east 168.5 feet from post 5 (sic) of the Boss. If, as is contended, by Post No. 5 the surveyor meant Post No. 3 of the Boss, this description is directly at variance with the field notes of the Nero, and a finding which places the northwest corner of the Nero at the point where the Hope surveyor thus says he found it, necessitates the repudiation of the surveys of the Nero, Pirate King and Conkling, and the shortening of all these claims in favor of the mere ex parte statement made by a surveyor in the course of the survey of a junior and conflicting claim, that he found a Nero post at a point 135.5 feet easterly from that at which the Nero survey expressly puts it.

Moreover, in the field notes of the Hope (Exhibit N), we find that the easterly end line of that claim intersects the northerly side line of the Democrat, Lot 84, at a point N. 48° 15′ east 117 feet from the northwest corner of the Democrat and that the southerly side line of the Hope, at a point 72.3 feet westerly from the Hope southeast corner, intersects the westerly end line of the Democrat. This

necessarily places the westerly end line of the Democrat considerably to the west of the Hope east end line.

On the other hand the Nero field notes (Exhibit L) show that the westerly end line of the Democrat, Lot 84, is some forty-eight feet easterly from the southwest corner of the Nero. It follows that the westerly end line of the Nero must have been somewhat more than one hundred feet to the west of the Hope east end line and that the Hope surveyor was in error when he identified the two as coincident. The effect of this evidence is diagramatically illustrated in the sketch shown on page 7 of this brief in which the Nero, Pirate King, Conkling and Hope claims are platted in accordance with their ties to the Boss and the lines of the Democrat are shown in accordance with their intersections as given in the field notes of the three claims, Nero, Pirate King and Hope. It is apparent that the evidence contained in these notes instead of supporting petitioner's contention, points convincingly the other way.

The Testimony Concerning Posts.

Upon the trial of the cause, the petitioner, in addition to the ex parte statement of the Hope surveyor, brought forward witnesses who testified concerning the finding at different times of certain posts marked as posts of the Nero, Pirate King and Conkling, at or near the positions where the westerly corners of these claims would fall were they all 135.5 feet short of their respective lengths as reported by their surveys and as patented. The following is a discussion of this evidence:

We quote from the testimony of Mr. Brooks, petitioner's surveyor and chief engineer. (Rec., p. 79.)

> "On July 29, 1882, I was engaged in making a survey of the Missouri lode, Lot 272, and at that time I found a post of the Nero. I found post No. 2 of the Nero at the time I made that survey. I don't think I have seen it standing since that time. I found it lying upon the ground in that vicinity in the neighborhood of the corner, on November 3, 1910."

If Mr. Brooks meant to say in this that he had found post No. 2 of the Nero at the shortened position claimed by the petitioner to have been its correct location, at least he did not so express himself.

In this connection it is significant that on his map (Exhibit B) Mr. Brooks did not make a notation to the effect that he had ever found a Nero post at the point where he placed corner No. 2 of the Nero on the map, although at the other important corners he made notations as to what he had found at different times upon the ground.

Mr. Brooks further testified that in 1908, or more than twenty years after the survey of the Nero and the Pirate King, and nineteen years after the survey of the Conkling, he found a post marking the common corners numbered 3 and 4 of the Nero and the Pirate King, respectively. He does not state, however, how closely, if at all, the bearing trees he found fitted the description in the field notes. Moreover, it would seem that although a bearing tree is called for by the Nero notes at its southwest corner, no such tree was found in this vicinity. His testimony follows (Rec. pp. 79 and 80):

"On September 2, 1908, I found an old quaking asp in mound of stones, very much rotted, but with marks still visible. These were 'U. S. 192, P. 3, U. S. 580, P. 4.' There was one post marking both corners, and also there was another post marked 'For Lot 580, a newer post.' There was a bearing tree called for near that corner from the field notes. The bearing trees were bearing trees to Lot 580 that I found. I did not find any bearing trees to Lot 192, or at least it don't show it. In the field notes of the Pirate King, the northwest corner of that claim, and the southwest corner of the Nero, were identical, but the bearing trees called for are found in the official notes of the Pirate King. The survey of the Pirate King was June 20, 1888, made by Adolph Jessen."

Mr. Brooks also testified (Rec. p. 84) that on August 27, 1901, while making a survey of the Twentieth Century lode, he found a post marked "P. 4-U. S. 689" at the point where he placed corner No. 4 of the Conkling claim. In 1907, when he was again at this spot, this post had been knocked out. Mr. Robert Gorlinski, one of the petitioner's witnesses, testified (Rec. p. 94) that he had been at the point referred to by Mr. Brooks in 1899, 1900 and 1901, observing for posts, and that he had never seen a post marked as a Conkling post at this point. It would seem probable, therefore, that the post found by Mr. Brooks in 1901, was not the original post of the Conkling survey, but was a re-established post placed there in accordance with the practice by some surveyor to mark the corner where he thought it ought to be. This probability is emphasized upon a consideration of the fact that the field notes of the Conkling (Exhibit O) show that no bearing

trees were available at the point where post No. 4 of the Conkling was originally placed, while Mr. Brooks testified (Rec. p. 86) that "near the southwest corner of the Conkling (Cor. No. 4) as I have platted it, there was a good many balsam trees; some of them are good sized trees, showing that they have been there a good while. Those are the ones I spoke of as being available for bearing trees."

J. Fewson Smith testified that in November, 1897, he had found a post marked as a Conkling post at the point where petitioner contends the northwest corner of the Conkling claim was originally staked, and that it stood with respect to two bearing trees in approximate accordance with the description in the Conkling field notes, and that he had found the same post standing upright in the same spot in 1909. (Rec. pp. 86, 87 and 89.)

Mr. Robert Gorlinski testified that in 1902, while making the survey for the Custer No. 2 and Silver Hill No. 4, he had seen this post marked as post 3 of the Conkling lying upon the ground alongside of a post marked as post 3 of the Pirate King at the point where Mr. Smith had previously seen it. He further testified that in his field notes of the survey of the Custer No. 2 and Silver Hill No. 4 he had mentioned a tie to corner No. 4 of the Conkling; that at the time of making that survey he had found no post marked as a Conkling post at the point mentioned as corner No. 4, but that he took a post of the Twentieth Century as marking the spot. That he had been over the same ground observing for posts in 1899,

1900 and 1901, and had never found a post marked as Post 4 of the Conkling. (Rec. pp. 92, 93 and 94.)

The post marked as Post No. 3 of the Conkling found on these different occasions was a pine post five inches in diameter, 5.4 feet long, hewed at the top on three sides, while the post marked as Post 3 of the Pirate King was a piece of scantling not quite 2"x4" (Rec. pp. 155 and 156), (Exhibit 3). Neither of these posts answer the descriptions in the field notes, which both call for pine posts 4'x4"x4" (Ex. O and M), and as to the genuineness of the post marked as belonging to the Pirate King, even Mr. Brooks was dubious. (Rec. p. 86.)

The foregoing is the evidence as to the finding of these posts. In other words, in 1897, eight years after the Conkling Survey, Mr. Smith found a post marked as a Conkling corner, but which did not answer the description of the post mentioned in the field notes, standing in the position that petitioner now contends the post marking corner 3 of the Conkling was originally placed. Thereafter, at different times, this same post, together with a post or scantling marked as post 3 of the Pirate King was found sometimes standing in a mound of stones, and sometimes lying on the ground at this same location. These later witnesses add nothing to the probative value of the testimony of Mr. Smith, and in view of the testimony of Mr. Brooks above set out as to the frequency of disturbances among posts in this region and the practice of surveyors of replacing lost posts, it is submitted that this evidence has little weight, if any, toward proving

that the original Conkling post was set 135.5 feet short of where the field notes and the patent place it.

The Bearing Trees.

The field notes of the Pirate King (Exhibit M) call for a bearing tree at corner No. 3. It is described as follows:

> "From Post No. 3 a balsam pine 14" in dia. bears S. 4 deg. 15 min. E. 28 feet distant marked U. S. 580, P. 3, B. T."

The field notes of the Conkling (Exhibit O) contain the following notation with respect to its corner No. 3:

> "Said latter corner being a pine post 4'x4"x4" firmly set; mark same U. S. 689, P. 3 for Post No. 3, from which a balsam 14" in dia. bears S. 4 deg. 15 min. E. 28 ft. distant and a red pine 17" in dia. bears N. 16 deg. 15 min. E. 35 feet distant, both marked U. S. 689, P. 3, B. T."

The testimony (Rec., p. 90) shows that in the vicinity of the old posts claimed to mark this common corner, two trees were found of appropriate size marked in accordance with the markings called for by these field notes, but the uncontradicted evidence also shows that neither of these trees correspond even approximately in course and distance with the description in either set of field notes, and that it is "utterly impossible" as stated by Mr. Brooks (Rec., p. 85) "for a surveyor to locate that corner from those bearing trees with the field notes as to direction."

Were the discrepancies slight they might be accounted for on the assumption that the surveyor was not careful or his instruments inaccurate, but no such as-

sumption can account for the discrepancies here apparent. For instance, the field notes of the Pirate King call for a balsam pine south 4° 15′ east 28 feet from the corner point. The tree claimed to fill this description is found *south 39° 37′ west* 26.9 feet from the corner, an angular discrepancy of 43° and 52′. A similar discrepancy with respect to this tree exists with reference to the Conkling notes, with the added uncertainty caused by the fact that the second tree is off 3° as to bearing and is out as *35 feet is to 22* in distance.

As stated by Mr. Brooks, it is utterly impossible to reconcile these trees with the field notes of either claim and especially with both. From the Conkling field notes we would expect to find two trees bearing a certain relation to each other, both with respect to their distance apart and relative compass bearing. We are confronted with two trees which do not even approximately correspond in either particular. An attempt to locate the corner by following the call of the field notes from one tree places the corner about thirteen feet *southerly* from the point where the petitioner contends it should be placed, while an attempt to locate it from the other tree places it thirty-one feet *northwesterly* from the point contended for (Rec., p. 85), and an attempt to locate it by the intersection of the courses is unavailing because the courses never intersect. If these are the trees originally marked by Adolph Jessen in 1889, when he made the survey, his continuous train of mistakes is explicable only on the theory that he used a divining rod instead of a tape and

transit. The following language from Pollard v. Shively, 5 Colo., p. 316, is just in point:

> "The call of the certificate is for a post. A stump does not answer the call. If parol evidence is admissible to show that a stump, and not a post, is the actual corner, it would be equally competent to show a pile of stones, or any other monument uncalled for. This would not be construing the calls of a survey, but making them; it would not be an application of the rule that monuments control courses and distances, but an infringement of the rule that in the absence of latent ambiguity, a deed cannot be varied or contradicted by parol evidence. It would not be controlling courses and distances by monuments, but controlling both by parol evidence. Claremont v. Carlton, 2 N. H. 369.
>
> "The rule is that where monuments are relied upon to control courses and distances, they must be found as called for."

It is quite evident that these bearing trees, instead of serving to clarify the issue, have quite the contrary effect. Instead of making the location of the corner post certain they merely send us into the field of conjecture as to where it was originally located.

But it is insisted that there is no evidence that any marked trees were found 135½ feet westerly from this point and that therefore these trees must have been the ones marked by Jessen and the original post must have been placed *somewhere* in their vicinity. The conclusion does not follow. Timber in a mining region is in much demand and it is a common thing to find such markings obliterated. As an illustration of the frequency of such occurrences we call the Court's attention to petitioner's map, Exhibit B. It will be noted that at each of the cor-

ners platted on this map Mr. Brooks made a notation as to whether he had found markings on the ground or had laid the lines in conformity with the patent calls. In the subjoined note* we quote a few of his observations as sufficiently significant.

As a further illustration of the uncertain and conjectural character of petitioner's proof it is submitted that if we test the Conkling boundaries by reversing the calls of the description, a method which has often been expressly recognized, we find that we make the traverse with certainty and precision and enclose the exact area conveyed in strict conformity with the surveyor's sworn report. Such a traverse leaves the end lines parallel and in the course of it we find nothing to interrupt its progress. We cannot stop for corner No. 4 at the spot where Mr. Brooks found a post in 1901 because it is not only *not* shown that this was the original post, but, on the contrary, it is shown that it must have been a re-established stake, because it was not there in 1899 or 1900 and the presence of numerous large trees surrounding the spot

*"U. S. 689, P. 1; U. S. 690, P. 1. No signs of old corner. Established by patent calls from U. S. 689, P. 2—U. S. 690, P. 2. Checks with position of corner as determined at time of 20th Century Survey."

"U. S. 191, P. 4; U. S. 580, P. 2; U. S. 689, P. 2; U. S. 690, P. 2. No signs of old corner or B. T. Established by patent calls from U. S. M. M. No. 4. Old pine post marked U. S. 580, P. 2, lying on the ground about thirty feet below this point."

"U. S. 272, P. 3. Locus determined by patent calls from U. S. 272, P. 6."

"U. S. 272, P. 2. Locus determined by patent called from U. S. 272, P. 6."

"U. S. 260, P. 1. Old corner lying on mound of stones. B. S. lying down close by. Roots of B. S. agreed with notes."

"P. 2.—260. Reset from P. 4, 214."

"U. S. 214, P. 4. Found old post with its point lying in mound of stones. B. T. had rotted off and was lying on the ground, but not in position. Could not determine its locus. Set new post."

where it was found, is at variance with the surveyor's return. Likewise, we must disregard the marked trees at the spot contended for as corner No. 3, because not only is there no evidence that they were the trees originally marked by Jessen, but the trees themselves belie the implication. Moreover, it is utterly impossible to locate the corner by reference to them.

In short, the only claim to recognition in favor of the spot asserted by petitioner to be the Conkling northwest corner is the fact that for the first time in 1897 two marked posts were found there, while at the shortened southwest corner a post was once seen in 1901, but never before or since. Neither of these spots correspond with the field notes in any particular whatever, but, on the contrary, are directly at variance not only with the Conkling notes but also with the field notes of the Pirate King and Nero. If, in order to determine the Conkling boundaries, it were necessary to balance probabilities with nicety, it would seem much more reasonable to hold that the surveyor of the Hope had made a mistake than that the sur-

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"P. 3,—126. Established from P. 3,—214. No evidence of old corner or B. T."

Note: Some distance from this point we find platted another post with this notation: "Post set by Brooks for P. 3,—126."

"P. 3,—214. Found no signs of old corner. Established by patent calls from P. 4,—214."

Note: Close to this point we find another post platted with this notation: "P. 2,—214 as reset from 4—215."

"P. 4,—215. Could not find corner or old mound. Found B. S. 30 inches by 18 feet lying on the ground. Reset corner from roots of this B. S."

"P. 4,—126. Established from U. S. 214, P. 4. No signs of old corner or B. T."

"P. 3, U. S. 216. Old post and mound. Set new one alongside. B. S. O. K. but marks obliterated."

"P. 4-41. Established by patent calls from 2-41 and 6-40."

Note: Close to this point we find another post platted with this notation: "Post set for 4-41 in 1885 and again in 1903."

veys of the Nero, Pirate King and Conkling were all erroneous and that this mistake by the Hope surveyor in his identification of the west end line of the Nero had at some later date been the cause of a re-establishment of certain posts at points differing from their original locations.

But the balancing of probabilities is not permitted. The law is well settled that where monuments are called for in a conveyance, the monuments will control the courses and distances as given in the conveyance because they are held more certain and definite as to what was actually surveyed; but as this rule is merely a declaration that the monuments control because they are the better evidence, it necessarily follows that the rule will have no application unless the proof as to the genuineness of the monuments and the fact that they have maintained their original positions is clear, positive and convincing. Lines of mineral surveys are short and are run by government officials with accurate instruments. The presumptive correctness of the returns of these officers cannot be over-

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"P. 3-41. Established by patent calls from 2-41 and 6-40."

Note: A short distance from this corner, we find platted another post with this notation: "Old post 3-41 set by Brooks in 1885."

"U. S. 272, P. 4. Reset from notes of 1885, at which time corner was reset from B. S. 4.3 ft. distant."

"U. S. 217, P. 2. Found old rotten post on the ground. Marks invisible. Set new post in mound of stones in place where I found the broken stump of post."

"U. S. 217, P. 1. No old corner found. Set new post from B. C."

"U. S. 216, P. 2. No old corner found. B. stump 17 inches diameter, seven feet long, lying on the ground. 'U. S. 216, B. C.' Set new post from roots of B. S."

"U. S. 216, P. 1. No old corner found. Locus determined by patent calls from U. S. 216, P. 2."

"U. S. 215, P. 2. No old corner found. Set new post from the hole and roots left by B. S."

come by the mere doubtful identification of a roving stake.

> "The rule that monuments shall control courses and distances is recognized only in cases where the monuments have been clearly ascertained. If there be doubt as to monuments as well as to the course and distance, there can be no reason for saying that monuments shall prevail rather than the course."
>
> 2 Lindley on Mines, Sec. 375.
>
> Pollard v. Shivley, *supra;*
>
> Duncan v. Eagle Rock (Colo.), 111 Pac. 588;
>
> 1 Snyder on Mines, Sec. 744.

In Thallman v. Thomas, 102 Fed. 935, it is said (p. 936):

> "The rule that monuments shall control courses and distances is recognized only in cases where the monuments are clearly ascertained. If there be doubt as to the monuments, as well as to the course and distance, there can be no reason for saying that monuments shall prevail, rather than the course given in the patent; and that is this case. There is just as much doubt where this

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"U. S. 214, P. 2. Pine stump 10 inches diameter and 3 feet high. No marks. Tree had been broken off. Found old post with point in ground lying down, marked U. S. 214 No. 2. Set new post at point of old one."

"N. L. 40, N. L. 42. Intersection set by Burton."

"P. 2,—40. New post set alongside of old drill. Old drill set by Major Gorlinski to establish position of this corner."

"P. 2,—40. New post set in same place where old post was set in 1885. The post set in 1885 replaced remains of old original post found standing in 1881."

"P. 1-40. Established by patent calls from P. 2-40."

"P. 6-40; P. 2-41. Established from P. 3-40 by calculation."

"P. 1-41. Established by patent calls from 2-41."

"P. 1, U. S. 126; P. 4, U. S. 127. Established by patent calls from P. 2,—127."

"P. 1, U. S. 127; P. 2, U. S. 126. No evidence of old corner. Established by patent calls from P. 2—127."

monument was first located as there is whether the course is correct, and therefore it is not possible to say that we shall first determine a doubtful point, as to where the monument was in fact located, and then give it effect to control what is expressed in the patent. Furthermore, it is believed that in any case in which parties claim that they shall hold by monuments, rather than by the description given in the patent, they must maintain the monuments in the position in which they are placed."

In the same case on appeal, 111 Fed. 277, the Court said (pp. 282-283):

"One of these rules is that patents, contracts, and conveyances, the accredited evidence of rights and title, may not be set aside or modified for mistakes unless these mistakes are established by evidence that is plain and convincing beyond reasonable controversy. Maxwell Land-Grant Case, 121 U. S. 325, 381, 7 Sup. Ct. 1015, 30 L. Ed. 949; U. S. v. American Bell Tel. Co., 167 U. S. 224, 251, 17 Sup. Ct. 809, 42 L. Ed. 144; Howland v. Blake, 97 U. S. 624, 626, 24 L. Ed. 1027; Insurance Co. v. Nelson, 103 U. S. 544, 549, 26 L. Ed. 436; Insurance Co. v. Henderson, 69 Fed. 762, 764, 16 C. C. A. 390, 392, 32 U. S. App. 536, 542; Railroad Co. v. Belliwith, 83 Fed. 437, 440, 28 C. C. A. 358, 361, 362, 55 U. S. App. 113, 120. Such evidences of the rights of parties bear with them a strong presumption of their correctness. They are generally prepared with deliberation, written with care, and made for the express purpose of solemnly recording the established rights, titles and interests of those whom they concern. Patents issued by the government after surveys of the land and examinations of the rights of the grantees and of the nation are buttressed by a presumption of exactness peculiarly strong. Every step in their prepara-

tion is required to be performed by disinterested officials in accordance with express provisions of statutes. They are issued by the United States to evidence the nature and the extent of its grants, and they bear its official seal. They evidence the decisions of a quasi judicial tribunal—the interior department of the government upon the rights of all parties to the land or privileges which they describe. They are recorded in the registries of titles, and all the world relies, and has the right to rely, upon their statements of the character and limits of the rights of the grantees whom they name. In view of these well known facts, no mere preponderance of evidence, no loose, uncertain, conjectural proof, ought to be permitted to strike down or change the nature or the extent of these solemn grants of the nation. Nothing should be permitted to reach that result but evidence so clear, unequivocal and convincing that it does not leave the issue in doubt. The proof of this case lacks every element of this character. When considered in the most favorable light, it is nothing but the balancing of probabilities of mistake between the courses and distances in the survey of the boundaries of the Nellie lode mining claim, and the course and distance from one of the corners of that claim to an improvement in an adjoining claim. It is loose, uncertain, unconvincing, and conjectural, and solemn grants of the United States cannot be annulled or reformed upon evidence of this character."

The Circuit Court of Appeals carefully read and considered the evidence which is entirely uncontradicted and free from dispute except as to the inferences that may be drawn from it, and found that the proof that the Conkling westerly posts were originally placed only 1364.5 feet from the easterly end line was not of the certain and satisfactory character required. It is respectfully sub-

mitted that upon the evidence here presented a reversal of that finding should not be made, that in fact a contrary conclusion would and could not be justified.

The patent involved in this case was issued in 1892. By its plain and unambiguous terms the United States purported to convey to the predecessor in interest of the respondent and its co-tenant, the petitioner, a tract of land 1500 feet long by 600 feet in width. During the 16 years that elapsed between the issuance of this patent and the commencement of this suit, neither the petitioner, who, as co-tenant with respondent held under it, nor any of petitioner's predecessors in interest, in the ownership of the Custer No. 2 and Silver Hill No. 4, took any action whatever looking toward the reformation of this instrument, a muniment of title of the very highest order. In this collateral proceeding long after the death of all important witnesses petitioner now seeks to change its calls to the prejudice of its co-owner.

If the loose, uncertain and conjectural proof introduced in this case by way of the notes of the conflicting Hope survey, of the finding years after the survey of the Conkling and Pirate King of certain posts which do not answer the description of the field notes, and of the finding of marked trees which correspond with nothing and from which it is utterly impossible to locate any corner, were sufficient to overcome the plain and unambiguous terms of the grant, then the tenure under a United States patent in a locality where "it is a usual thing to find disturbances among the posts" would be indeed uncertain. The patentee, as well stated by Mr. Justice Field,

in Beard v. Federy, *supra*, "would find his land located in as many different places as the varying prejudices, interests or notions of justice, of witnesses and jurymen might suggest."

II.

The Elephant Stope is not Shown to be a Part of the Crescent Fissure Vein Which has its Apex in Claims of the Petitioner.

In order to make more clear the references to the opinion of the trial court we shall refer in this branch of our argument to the petitioner as defendant and to the respondent as plaintiff.

Manifestly it was incumbent upon the defendant in establishing its sole title to the ores in question to show by a preponderance of the evidence that those ores belonged to a vein of which it owned the apex and which it had the right to follow into the Conkling claim.

This proposition was presented and argued to the Circuit Court of Appeals upon the first appeal, but in view of that court's holding denying the defendant extralateral rights upon the Crescent Fissure, it did not feel called upon to decide the point.

The question was solved in favor of the defendant by the trial court, but, in the mind of the court, "the conclusion reached cannot be claimed to be free from all doubt." (Rec. 259.) It is not disputed by the plaintiff that a fissure on its strike crosses the parallel side lines of these claims and on its dip passes beneath the Conkling Mining Claim in the immediate vicinity of the ore body in dispute and between vertical planes drawn

through the parallel side lines of the defendant's claims and continued in their own direction. And it is not disputed that if the defendant has extralateral rights upon this fissure the segment thereof, which is beneath the Conkling, bounded by said extralateral planes, is the exclusive property of the defendant. It is not disputed that within the meaning of the law the Crescent Fissure is a mineral vein, that is to say, it has such characteristics and contains within its limits such amount of mineral-bearing rock and such indications of the presence of ores and minerals as entitles it to be considered a vein within the meaning of the Act of Congress. But plaintiff does dispute the fact that the ore body known as the Elephant Stope is any part of the vein or lode called Crescent Fissure or is contained within its limits. The position of the plaintiff is that even though it were to be assumed that the owner of the Constitution, Cumberland and Monroe Doctrine Claims has the right to pursue the Crescent Fissure through their located end lines, still it has the right to pursue that vein only and has no right to extract or appropriate the ores of the Elephant Stope.

There are many facts upon which the witnesses for the parties were agreed, and some of these have been stated by the Court in its opinion. Among others, it is a fact asserted by both parties that the Crescent Fissure has been developed on its strike for many thousands of feet and on various horizons. It shows evidence of two distinct periods of fissuring, the first resulting in a filling of the fissure with porphyry, the second reopening the old fissure, constituting as it did a plane of weakness. This

second fissure fractured, ground up and in places seems to have removed the porphyry. The country rock within the limits embraced in the controversy is limestone striking approximately east and west and dipping about 20 degrees to the north. The Crescent Fissure strikes about north 60 degrees east and south 60 degrees west, and dips to the southeast at an angle of about 53 degrees. On the foot wall side of the fissure at many different horizons ore bodies are found in the foot wall lime lying with the stratification of the lime. No similar bodies have been found on the hanging wall side of the fissure. The ore body in controversy, the Elephant Stope, is one of these bodies. Where the porphyry still exists in the Crescent Fissure it is almost invariably the hanging wall portion of the vein. The fissure itself is but feebly mineralized in comparison with the bedded deposits, but in places the ore is found in considerable quantity in the fissure. The ore body in dispute has been stoped for a distance of at least 150 feet away from the fissure.

The foregoing facts, which are undisputed and insisted upon by both parties, were by the Court made the basis of his finding that the fissure vein and the deposits in the stratification of the lime (called by the witnesses the bedded veins of the ore deposits) form but one vein, to-wit, the Crescent Fissure Vein. To these facts, however, the Court added the further finding that the ore body in dispute, to-wit, the Elephant Stope, shows the greatest distance to which a bedded deposit is shown to exist away from the Crescent Fissure. This is disputed by plaintiff, which insists that the Crescent vein so-called,

a bedded deposit, is another example of a deposit of ore connected with the Crescent Fissure in the same manner as is the Elephant Stope, and extending for at least 1000 feet off into the lime beds and conformable with the stratification thereof. The testimony also shows as we contend that the Elephant Stope has been worked in profitable ore for not less than 180 or 190 feet from the Crescent Fissure and at the lower extremity of the stope in the lime beds, that is, the point where it is farthest from the Crescent Fissure, the ore is still strong and presents a large workable face extending still farther definitely into the lime beds. In other words, that the extent of the Elephant Stope ore body has by no means been defined and that it has not faded out into the lime beds. The Court also seems to lay stress upon what is assumed to be the fact, that other ore bodies found on the foot wall and lying with the stratification of the lime fade out within a short distance from the fissure. Plaintiff contends that without exception all of these ore bodies present indications of a strong body of ore and that if they had been exploited and worked by the defendant, they would have presented in some cases instances of ore bodies as strong and profitable as that in the Elephant Stope.

The contention of the defendant was that the Crescent Fault Fissure was a primary source of mineralization and this view seems to be adopted by the Court (Rec. 261), where he states that in places the porphyry doubtless furnished a barrier to the permeating waters. The Court also finds that there is no evidence of any extensive faulting or throw. That there was a fault on the line of

the fissure is insisted upon by the plaintiff and seems to be conceded by the defendant and found by the Court. The extent of the fault was perhaps not very important, but seems to be the only matter in controversy upon this subject.

If we eliminate from the record that testimony which is directed to the matters upon which no controversy exists between the parties, the remainder of the testimony devoted to the subject under consideration in this part of the brief is not extensive. Expert mining engineers testified on each side, Mr. Wiley and Mr. Blood for the defendant, and Mr. Boehmer, Mr. Wilson and Mr. Palmer for the plaintiff. In addition to these, the testimony of the practical miners, Gitsch, Dailey and J. B. Kearns, for the defendant, and Parker and Treweek, for the plaintiff, constitutes the entire body of testimony which need be considered on either side. Upon the part of the defendant, in order to maintain its right to the ores of the Elephant Stope, it was contended that the Crescent Fissure is a true mineralizing fissure, that is to say, a fissure through which the mineral solutions came from the depth and deposited the ores which are found disseminated at different places throughout the extent of the fissure, as well as the ores found in the bedded veins. On the part of the plaintiff it is contended that the ores in the bedded veins were in existence and in place prior to the creation of the Crescent Fissure and that this fissure is a mere faulting fissure originally filled with porphyry which is its main characteristic and afterwards causing or permitting a faulting of the lime beds along

the strike of the fissure, and that no mineral solutions ever came up through the fissure, so that the only ores found within the limits of the Crescent Fissure are such ores as were cut in the original beds by the fissure, dragged in and ground up with the porphyry in the sliding and grinding movement along this faulting fissure, or else such ores as were dissolved out of the bedded deposits by the action of surface waters and redeposited in the fissure. In other words, the question is made between the parties as to whether the ores which are found in the Crescent Fissure and in the bedded veins are genetically the same, or whether, as contended by the plaintiff, the ores of the Crescent Fissure are later and are derived entirely from pre-existing bedded deposits. It is not contended by the plaintiff that this question has any other or greater significance than merely to point to the fact that the bedded deposits, both physically and genetically, are different from those of the Crescent Fissure and that they are so far different, both in kind, in richness, in form and in occurrence, as to form separate and distinct veins capable of separate and distinct ownership. It is not contended that the miner is called upon to determine abstruse questions of geology, or that if the bedded deposits are in the meaning of the law a part of the same vein as the ore from the Crescent Fissure and belong to the fissure they should be severed in ownership simply and solely because their genesis was not the same. Many of the facts which are found in the testimony are interpreted by the witnesses upon the basis of divergent theories held by

them upon this purely theoretical question as to the genesis of the ores.

As we have heretofore indicated, the principal points of controversy between the engineers for plaintiff and defendant were upon matters of interpretation of the general facts disclosed in the ground in controversy. There were, however, some discrepancies as to what was to be found in various workings. Relatively these were not important.

The Court in its opinion (Rec. 260) discusses the characteristics of a fissure vein and quotes from Spurr and Ries. From the standpoint of a geologist the description given of this class of veins and of the features which very frequently are found in connection therewith, is apt and instructive. But the law of Congress which defines the rights of miners upon veins was not written for geologists, but for practical men. The expert geologist is of very great assistance in the work of exploiting mineral ground and his deductions from the facts shown in any given instance may be well worthy of the closest study. The only part which he can play in the determination of a practical question, such as is presented in this case, is to give the results of his careful study in order to explain why it is that one vein differs from another, if they do differ, and what we may be able to expect as to the occurrence of these veins when the ground shall be further exploited. The Court in its opinion (Rec. 261) recognizes the fact that these techincal definitions and these disquisitions upon the distinguishing characteristics of a fissure vein are merely a part of the learning of theorists

and that after all the true test is that which is applied by the practical miner.

The very first witness introduced by the defendant in this case, Charles H. Gitsch, throughout his testimony, drew the distinction of the practical miner between the ore deposits found in the Crescent Fissure and those found in the bedded vein, particularly the Crescent Vein. Right here permit us to draw attention to the distinction between the Crescent Fissure and the Crescent Vein as we use the latter term in this brief. The Crescent Fissure is the occurrence which has been so frequently alluded to and which has its apex in the easterly ends of the Constitution, Cumberland and Monroe Doctrine, and which apex is roughly illustrated by the Constitution East Drift and Constitution West drift, so frequently referred to in the testimony. The Crescent Vein is that certain bedded vein or system of bedded veins in which are found the extensive workings lying to the easterly and to the westerly of the Aetna Tunnel and which are found in the Buckey and Pinyon Extension Claims, and which also are shown with great detail on the Original Crescent Map, which is introduced in evidence as Exhibit G G. These workings are explained by Mr. Brooks in his testimony. They extend from the apex of the Crescent Fault Fissure upon a northwesterly dip of about 20 degrees for a distance of 1000 feet. It is perfectly apparent that these are not any part of the Crescent Fault Fissure, although physically the stopes are connected with this fissure by ore in the fissure at its connection with the beds. As we have said, the first witness, Mr. Gitsch, in his testimony

(Rec. 67) makes frequent reference to the work in which he participated which was sometimes in the fissure, that is the Crescent Fissure, and sometimes in the vein, that is the Crescent Vein or system of veins, because it appears that the ores in the Crescent Vein are not always in the same beds but some are somwhat higher in elevation than others. For instance, he says that where the Aetna Tunnel struck the vein "we called it a fissure." He then explains (Rec. 68) how the West Drift was driven along the fissure to a connection with the Apex Winze and that there was ore all the way from the West Aetna Tunnel. He states that it was in pockets in the fissure. He explains that at times they struck a higher grade of ore, and the plain inference from his testimony is that where they struck ore in the fissure was at a place where there was an intersection with what he calls "verticals." These verticals are important in this case and will be later referred to. They are small seams or veinlets which come from below and which intersect the main fissure and intersect the ore bearing beds of lime, and where these intersections occur are found in many cases large and rich deposits sometimes close to or in the fissure and sometimes out in the beds of lime. They are referred to by the geologists as the possible feeders or sources of supply of the mineral waters which form the ore. Mr. Gitsch says that in the fissure he had low grade ore. Then in Crescent No. 1 near Station 408½ he "took a vertical and struck ore about three feet out from the bottom of a vertical winze." There was only a small pocket there, but he started down on it and it opened out into a sort of flat

stope in the limestone. He says there were two stopes, one above the other, about 22 feet apart and there was carbonate ore separating the two. This was the McGregor Stope, shown upon Exhibit A and Exhibit G G, and is shown as a flat stope in the limestone. He says:

> "The other flat stope that I spoke of before was worked out. This extended about 60 feet from the fissure out into the lime. Along the drift westerly that ore body extended about 40 feet long in the limestone. It averaged about 4 feet in thickness. The ore in the McGregor Stope connected with the ore in the fissure above the level about thirty feet. The stope beneath was connected with the ore in the fissure, and there is also little fissures running from this main fissure to the ore body."

He then speaks (Rec. 69) of going up in a raise from the West Drift 20 or 22 feet and striking a flat stope. He also speaks of going up about 165 feet in a fissure on low grade ore all the way, and after this a drift was started out both ways, north and south, shown as Pete's Drift, and that after they ran out a ways they struck quite a large stope and the ore was not over three or four feet thick, but was high grade, solid galena. Later he speaks of sinking the Aetna Incline which is shown on the easterly end of Exhibit A, and states that it went down 225 feet in the fissure. There were little bunches of ore leading off from the shaft and quartz and vein material. And then when they got down to No. 2 Level in the Aetna Shaft they went out in a westerly direction 246 feet in the fissure in low grade ore all the way. He speaks of the porphyry as being part of the vein and that they would

find ore in the porphyry. But the hanging wall of the vein was lime. He says:

> "We regarded the porphyry as a part of the vein but we never drifted into it very far because we always got water."

He further says (Rec. 71):

> "Sometimes I speak of the vein and sometimes the fissure. I make no distinction. I used to sometimes speak of the vein and sometimes of the fissure. They are one and the same. That is the way we made use of them when I was working there. We made the distinction between the fissure and a bedded vein and drew a sharp distinction between them. I am not an expert and cannot tell any more clearly than I have what composed the vein; only I know it is vein material in the fissure or in the bed. A large part of the vein material is porphyry. • • • The porphyry was on the foot wall side; the bigger part of the vein would be on the foot wall side. There is no break of the lime beds. They seemed to have the same pitch, dip and strike."

Further on he says:

> "All the ore whenever we struck it was in the fissure and in the foot country. When it was not in the vein it was in the foot country, and not in the hanging. The fissures and crevices I speak of run into the foot wall country. All these connections with these bedded veins that lay in the lime were in the foot wall. The fissure vein would naturally strike right through the country, and the bedded veins, some of them, were flat and others would have a slight dip to the north or west, and in some places have a dip from 12 to 25 degrees to the east. These bedded veins always lay conformably to the beds of the limestone, always dipping a little to the north; I mean the rake was a little

to the north and the west. That is what I understood to be the dip of the lime beds. The dip of the vein would be conformable to the lime beds. We always distinguished these bedded veins because they always led out in the lime in the foot wall part of the fissure. In their extent out from the fissure they varied from 60 to 150 feet. We would be led to these bedded veins from the fissure veins by seeing some of these little verticals cutting through there—vertical fissures as they called them—that would lead from the main fissure to these bedded veins. The ordinary way of speaking of them was as verticals. There would be a little bed of ore and from a half inch to a quarter of an inch of filling between them, and sometimes a little talc and quartz and sometimes a little oxide also. These verticals would always strike out from the foot wall side of the fissure, and of course the porphyry side of the fissure is always the hanging part of the veins."

From this it is perfectly apparent that the witness as a shift boss and practical miner never had any trouble in determining that at some points at least he was not in the fissure, but was in what he called a bedded vein. We do not mean by this that where the bedded vein came up to the fissure there may not have been a little uncertainty in allotting the ore to one or the other. But the point we make is that there were two different and distinct characters of deposits, namely a fissure vein and a bedded vein or bedded veins. Again he says (Rec. 73):

"When we got out into the ore bed that was a very flat stope. It was flat and of course the vertical disappeared."

Again in speaking of these verticals, he says (Rec. 73):

"We followed these verticals up 20 or 22 feet if I remember right and then you come into a flat stope—as flat as the one below that. It was nothing but sand carbonate and the average height was possibly about five feet. These verticals are right in the fissure. • • • The verticlas would have a strike more east and west than the main fissure. They were easily distinguishable from the rest of the country on account of the lead and chloride in it. These were the first verticals we observed along the Aetna West Drift between the place we got ore over to the easterly and Raise No. 2. In going along the Aetna West Drift the next time we came to verticals we again found ore. • • • The next place westerly of Winze No. 1, where we found indications which led us to ore, was at a little cross-cut that runs up to a winze or an incline between the words Baskin and Stope. We found a little ore in a cross-cut marked in blue opposite Station 437. That was run into the the foot wall. We did not follow anything. It ran perhaps 15 feet and we got nothing. Then we ran the cross-cut which I indicated before as being between the words Baskin and Stope. We did not find anything in that one either. *We did not have any vertical to run to.* Next at a point at the letter B in the word Baskin we found a vertical with some lead ore in it. It was high grade, but small."

It is apparent from this testimony that it was not the Crescent Fissure which led to the ore but the verticals which were intersected by this Crescent Fissure which they followed to the stopes in the beds.

Again he says (Rec. 75):

"I am familiar with a stope at the easterly end of which is the word 'Tunnel' and about the mid-

dle of which is a working called 'Ole's drift,' from which point it extends westerly some six or seven inches on this map. The ore here lies in the bed. Its dip is west about 12 degrees north and conforming with the dip of the limestone in that immediate vicinity. That stope was not all worked out before I quit working there. We thought we had all of that out, but that was the big stope and we had to leave pillars of second class ore there. The enclosing wall was exposed on the top and bottom. It was barren lime."

By reference to the map, Exhibit A, and the apex of the Crescent Fissure as claimed by the defendant lying entirely to the easterly of the Buckley Claim, it is obvious that this large stope lying in the beds of limestone extending as shown on the map a distance of nearly 700 feet northerly and southerly and about 100 feet easterly and westerly, cannot belong to the Crescent Fissure, and was not by the practical miners who worked it considered as belonging to it, but as being a separate bedded vein. So, if we examine the workings of the Crescent on the old map, Exhibit G G, we find these stopes extending a long distance on the dip of the limestone and not in any manner connected with the fissure for the reason that they lie at a higher elevation than the easterly end of the fissure at the Boss Shaft. For instance, the elevation of the easterly stopes near "Gitsch's Drift" and in the vicinity of the Climax Shaft, have an elevation of about 2350 feet, while the elevation of the apex of the Crescent Fissure at the Boss Shaft is marked as having an elevation of 2170 feet. Remembering that the limestone dips toward the northwest from the Boss Shaft, nothing could be

plainer than that we have in this vicinity two distinct deposits, a bedded vein known as the Crescent Vein, and a fissure containing very little mineralization and showing no stoping.

At this point we desire to call attention to Exhibit C C, which is called a projection along the strike of the Crescent Fissure. This projection is most misleading, for the reason that every stope of ore in the lime beds being projected upon a plane parallel to the strike of the Crescent Fissure would seem to be and was intended doubtless to indicate that the ores were found in the fissure instead of in the lime beds. We must remember that what appears to be a solid sheet of ore in the Crescent Fissure is in most instances merely the edges of the bedded veins projected upon a plane.

James B. Kearns was the other practical miner who worked in the workings near the Aetna Shaft and the Aetna West Drift, Aetna Levels No. 2, No. 3 and No. 4. Although produced by and doubtless favorable to the defendant, his testimony unavoidably showed that little or no ore was found in the Crescent Fissure and that it was only after leaving this and getting out into the limestone which formed the foot wall that bodies of ore were discovered. He says (Rec. 101) that he was shift boss and while he was there Drift No. 2 was driven about 400 feet.

> "This level is driven on vein matter on (in) the fissure. Vein matter is quartz, ore, porphyry, lime all crushed up. We had carbonate and galena ore in the level as it was driven along the vein as far as we drove it. There was ore all the way along that level. We could recognize it by the eye with

out having an assay made. There was some ore saved, sent to the mill, and shipped. After we had run No. 2 Level we came back and raised on the ore up the No. 2 chute to the Baskin Stope."

This Baskin Stope is indicated indefinitely upon the map, but is shown to be of very great extent. Mr. Brooks tells us in his testimony (Rec. 98) that:

"It lies above Level No. 2 and is partly in the beds and in the fissure. It extends out in the beds about 100 feet from the fissure. The ore body lies conformable to the beds where it is in the beds. * * * The Baskin Stope ore body is in the beds."

Mr. Kearns continues:

"Up about 15 or 20 feet we encountered a flat ore body. The ore we took out of the Chute No. 2 was carbonate ore. It was all shipping ore. It was in the fissure. * * * The flat ore body which we got up 15 or 20 feet in the chute extends about 100 to 125 feet out in the beds. It was about six feet thick and came down to as low as a foot thick before it gave out in the bottom. It was dipping along on the lime beds. The ore in the beds here commingled and connected with the ore in the fissure. We followed it from the fissure right out into the lime beds at the west end, and along the level in an easterly direction we stoped it out about 250 feet. We had lime above the flat ore body, barren lime, and lime beneath it, and lime at the northerly terminus of the ore body and at the east end of it. I did not see any indications of fissuring in the flat stope. The ore we took out of the flat stope was merchantable ore."

Nothing can be more apparent than that this practical miner who was shift boss and had the direction of the work had no difficulty in determining that there were

two veins, one a bedded vein resulting in flat stopes conformable to the beds of lime, and the other a fissure vein. He was not bothered about the geology of the country or the genesis of the ores. What he knew was that when he was in the vein which contained porphyry he got little ore. When he got into the flat beds conformable to the lime, he got high grade shipping ore. We lay emphasis upon the testimony of these men because, as we suggest, it refutes the testimony of the experts that all the ore wherever discovered, whether in the Crescent workings or beneath the surface of the Pinyon and Pinyon Extension, or beneath the surface of the Conkling, is attributable to and a part of the Crescent Fault Fissure.

The testimony of Mr. Brooks, the engineer of the defendant, leads to the same conclusion. He had been the surveyor for the Crescent during the time of its working some twenty years before the date of this trial. He had been the engineer of the defendant for a very great many years. He has a lithograph map, which is introduced in evidence as Exhibit H H, which shows the workings exhibited on maps Exhibit A and Exhibit G G, and in addition show the workings of the Great Silver King property lying further to the northeast, which, for the most part, lies in stopes in the bedding (Rec. 101). He says (Rec. 99), speaking of the Baskin Stope:

> "It shows the ore in the fissure connecting with the ore in the bed in this part; we called it ore in the bed, and between the two is a space marked 'quartz' that is barren country."

In so testifying he was speaking of the section marked Exhibit F F. In speaking of Section E on the

map F F, he says it was intended to show ore in the beds and ore in the fissure, and that Section H shows ore in the beds connected with the Baskin Stope which latter is in the beds.

Speaking of Exhibit G G, the original Crescent map, he says:

> "The general dip of the beds containing the Crescent ore body is a north northwesterly direction—a little west of north, and the general dip from the extreme northwest lower ore bodies to the extreme southeasterly would be about 15 degrees. It would be, roughly, from the point marked 'Square Set Stope' up to the stope along the Buckley Tunnel, up 1000 feet, giving a difference in elevation of 275 feet, which would be about 15 degrees dip. That would approximate the general dip of the lime beds as well."

Speaking of the Baskin Stope and of the extent of it marked on the map, he says (Rec. 99):

> "I do not know how much farther the Baskin Stope extends down through subsequent workings after the time I went in there and made my observations."

So that for aught that here appears the Baskin Stope may extend very much farther down in the lime beds than is here represented.

Further speaking of the general occurrence of ore in that region, he says:

> "Exhibit H H embodies the work upon the Crescent Hill, which is included within my plan map A. There may be some little details that are carried out better on the larger map. It includes the same territory. And going to the northeasterly it includes the workings of the Silver King and

includes the Alliance Tunnel to its portal and the Hanauer Tunnel to its portal, and certain cross-cuts coming across from the Alliance Tunnel through the workings of the Silver King Mining Company. Generally speaking, the lime beds that are in the territory covered by the maps, Exhibit A and Exhibit H H, have about the same dip as the lime beds throughout this portion of the territory, which is called the Silver King property. In the Silver King mine the occurrences of ore in the lime beds are conformable with the dip of the beds. The production of ore from the Silver King workings has been very large indeed. Exhibit H H is on a reduced scale and is probably a little greater than 400 feet to the inch."

The testimony of M. J. Dailey, a witness produced by the defendant, is also instructive on this point. He testifies (Rec. 104) that he was at one time in the employ of the Silver King Mining Company and the Kearns-Keith Company, and was subsequently with the defendant. He was superintendent at the Kearns-Keith, which was the owner of the premises in controversy prior to the time it sold to the defendant in June, 1907 (Rec. 107). He tells us (Rec. 105) that he drove the Hanauer Tunnel, which is the same as Level No. 2, in 1902, and retimbered the level in places. It was driven on the fissure. The vein here passed in porphyry, crushed quartz, ore and talc. After stating that he drove along the level and encountered high grade ore at some places and had no rich ore, no pay ore west of about Station 557, he states that he made raises up from the Level No. 4. One of these was the Apex Raise, which went up in the Crescent Fissure. He says:

"I encountered a flat ore body that made out into the beds. It joined with the ore in the fissure. There was no difference in the appearance or grade of the ore in the beds than in the fissure. There was shipping ore in the beds. About one-tenth would be shipping ore and the balance would be milling ore. This was in the fissure and in the beds both. At different places and stations in which ore was found making out into the beds its farthest point did not exceed 20 or 25 feet as I remember it. It was hard to say at all times whether it was bedded deposits or just a swell in the vein or ore. The ore body that lay in the bed would be from 15 to 20 feet down to nothing in thickness. * * * In the roof above the flat ore body we had barren limestone, and the same formation beneath this flat ore body. * * * The ore that I stoped extended below the 400 level. We stoped it below this level and opened up a bedded deposit, probably 50 feet below the level as I remember it now. Until we got down 50 feet the ore was in the fissure, and then it made out into the beds. * * * The work at the westerly end shown here in white marked 'Stope unsurveyed,' when I got down 50 feet or so in the fissure the ore made off into the beds not to exceed 30 feet greatest thickness, and from that down to nothing practically. The roof of that ore body when it was mined out was barren limestone and the same formation beneath it. * * * Also the stoping lying above and apparently connecting with level No. 3, between Reimer's raise and Apex raise. This was both in the fissure and in the beds above the levels. The flat ore body extended not to exceed 25 or 30 feet along there into the beds. This flat ore body was overlaid and underlaid with barren limestone."

By reference to the map it will be seen that the unsurveyed stope spoken of by the witness, together with

the surveyed stope, is indicated as extending easterly and westerly about 100 feet out into the beds. It may be remarked that the extent of this stope is purely problematical because it was put upon the map by Mr. Brooks from a general description of it given by Dailey. (Rec. 98.)

Dailey gives a description of the Crescent Fissure which shows clearly that it was easily distinguishable from the deposits of ore in the beds. His description (Rec. 108) is as follows:

> "I have spoken of the Crescent Fissure. This is a name well known as applied commonly to that particular fissure. It was always used by us in referring to it. The name was applied to it before my time. It was not usually applied to the fissure found in the Alliance tunnel to my knowledge, but it was applied to the fissure found in the Hanauer tunnel. It is a pretty uniform fissure wherever one meets it, and easily recognizable as such. Its general characteristics are that it is a pretty large fissure, filled with porphyry, crushed quartz, crushed material, ore, and having walls, both foot and hanging. *It is characteristically a fissure through the rock as distinguished from a bedded vein or anything of that sort.* A great deal of the crushed material is crushed to a mud; some of it crushed to mud and talc. The other particles I recognize as crushed quartz and lime in the fissure, with iron pyrites in places. To the best of my belief and knowledge, I would say that it would be a fair thing to state that from the point where the Hanauer tunnel first strikes the Crescent Fissure on for 2800 or 2900 feet to the face, as I found it in 1902, there was a continuous body of ore visible to the naked eye, with waste mixed in with it. No part of this was stoped in this distance, before we got to the Aetna shaft."

But he does not state that any considerable portion of this distance produced ore that could be stoped.

Again he states (Rec. 109):

> "At about Station 630 in the Hanauer level we ran into pay ore in quantity. • • • We had six or eight feet of good ore in the fissure at that point. That ore extended about 150 feet along the drift. We went down, stoped out, runing an incline down on it 25 or 30 feet. The ore went out into the beds from this incline, but not to exceed 50 feet. It was 30 feet wide in places and feathered down to nothing as you went out into the beds. By width I mean from top to bottom. It extended along the strike of the beds approximately 100 feet. As I remember there were two beds of ore went out between the Hanauer tunnel level and No. 3 level, but I cannot give the distance or the height. • • • It went about 25 feet out into the beds."

Even the witness, George D. Blood, who was an expert engineer for the defendant and superintendent of its properties, at various places, through his testimony, is careful to speak of the fact that the ore is in the fissure, although in his testimony with regard to Exhibit D-D he includes within the fissure every occurrence of ore, including the Elephant Stope, no matter how far it extends out into the beds or how plainly it appears to be a bedded deposit. For instance (Rec. 117), he speaks of certain ore as being in the fissure. Then he speaks of certain work and says: "It is in the fissure and shows ore—did show ore when we drove it." Again: "It conformed to the dip of the fissure and was the foot wall fissure—the ore was all in the fissure." Again, in explaining the driv-

ing of the Columbia Raise from the Elephant Stope up toward the surface, he says (Rec. 120):

> "We had followed porphyry in the raise almost continuously up to a point about 40 feet below the Engine Drift. We then had the slip showing in the back of our raise, and we got under that slip slightly, but picked it up again when we reached the Engine Drift, and I satisfied myself that we had the Crescent Fissure. The fact appearing that we did not have the porphyry in our raise, I put in a foot wall and a hanging wall cross cuts, to see if by any chance the porphyry was lying above or below the vein that I was following as the Crescent Vein."

Again, in speaking of following the Crescent Fissure in driving the Columbia Raise (Rec. 121) he says:

> "I will state that we took up and started driving the Columbia raise at a point about 60 feet above the Alliance tunnel level, continued it on the slant that it then had until that was getting away from the porphyry, when I tipped it up to reach the porphyry again, and did continue in the porphyry as far as the porphyry went up on the Crescent Fissure. It is possible that the mud that occurs in places two inches wide or one inch wide or six inches wide, as we go up through there, may have some—may be related to the porphyry as a decomposition product. That I cannot determine, whether or not it is true. We reached the Alliance tunnel level, where there is a showing of ore conforming to the fissure lying on the foot wall of decomposed porphyry in place in quantity, but crystalline material."

In speaking of the Elephant Stope, he says (Rec. 122):

> "I have seen the Elephant Stope at different periods during the past five years. At times they

were working in there, and at times they were not. The major part of the ore mined from the Elephant stope was taken from what I would call the bedded deposits. It did not lie regularly with the beds—the ore made in the beds, and it also made into the fissure above and below."

Mr. Blood, in his testmony, uses the word Crescent Vein as something different from the Crescent Fissure which we have spoken of as the workings extending on the dip for 1000 feet or more northerly from the Pinyon and Pinyon Extension Claim. He uses it as a broader term than Crescent Fissure, but means the vein connected with the Crescent Fissure. Upon this point he testifies as follows (Rec. 123):

"The Constitution east and west drifts were run under by direction, and my idea in running them was to run them on the top of the bed rock, and I did so run them, to the best of my ability. There can be a diffrence in judgment as to what constitutes solid bed rock and what constitutes wash. It is practically at the bottom of the wash and on top of the bed rock all the way. I have spoken in my testimony frequently of a vein, the Crescent vein, and the Crescent fissure. By the use of the word 'vein' alone I mean to include the fissure and mineralization extending from the fissure. By Crescent vein I mean the vein which is exposed in the Constitution tunnel both east and west, and in the No. 4 level of the Crescent mine from the Aetna shaft westerly, and in the Alliance tunnel, in the drift that is to the south of the stope, the Elephant Stope, and including the Elephant Stope. When I speak of fissure I intended to convey an opening that has more or less of a deposit, that has more or less porphyry at the present time, showing walls of gouge or slickensides, indicating that it was at

one time an opening. Vein is a larger term; it embraces this opening or what was at one time probably an open space and mineral deposited extending from that, either an enlargement of the open space or with boundaries conforming to the direction of the fissure, or perhaps not conforming to those boundaries.

"There is not any clear distinction between the two expressions in the testimony I have given, except as I have explained. I think the term 'vein,' is somewhat broader than the term 'fissure.'

"I include in the Crescent vein deposits that make out into the lime beds from what I consider the fissure. I mean to include in the Crescent vein some of these deposits which have been spoken of by witnesses heretofore testifying as the bedded vein, and to their fullest extent. The bedded veins that have been mentioned as being connected with the Crescent Fissure up to this time in the testimony taken in this case, I consider as all a part of the Crescent Vein. That would include Crescent workings in Pinyon Hill which are connected with the Crescent Fissure, as that fissure is exposed in Levels 4, 3, 2 and 1, and the Aetna west drift, and (those) bedded deposits which are marked Exhibit A as the Baskin Stope, and that bedded deposit which is marked on Exhibit A as the McGregor Stope. One marked difference in veins is the difference between a fissure vein and a bedded vein, speaking generally. I will state first that the two classes of veins may be very closely related to each other, and in this particular case are, but it is not always so easy to find the relation between fissure veins and the bedded deposit. There are bedded deposits in the Park City district which conform to the bedding of the quartzite and lime, or the junction of those two formations, and are so extensive with relation to that particular horizon that they would be, in my

view, considered a bedded deposit as distinguished from a fissure. There is also in the Park City district such deposits, or very large deposits and valuable, that have been almost wholly connected with fissures and directly in the fissures, and those I would call fissure veins, and I think generally are considered as fissure veins.

"A fissure vein is a vein in a narrower sense, and in order to differentiate from the bedded vein, it is a vein which conforms to a fissure. Now, if you want those—and I will add that those two may be merged, and that the two come into relation with each other so that they make one vein system."

Mr. Blood recognizes the fact that the Crescent fissure cuts the lime beds in such manner as to make it as far removed as one could imagine it from the bedded veins. He says (Rec. 124):

"In this particular case of the Crescent Hill the fissure which I call the Crescent fissure, does cut the lime beds in such a manner, that is as far removed from a conformability with the beds as one could well imagine."

In explaining how the dotted lines were drawn on Exhibit D-D to illustrate the thickness of the vein, he states that this line is drawn from point to point, the utmost points being the utmost limits of mineralization as determined by the workings in the beds. He says (Rec. 125):

"We drew the line between the point on the Apex Tunnel and the point on the 2000 horizon line, in the shape in which it is drawn because we had no better way of drawing it. I do not mean to say, of course, that the limits of mineralization of this fissure extend out there because of any fact that we have seen that shows it there, but it is drawn between those two points merely as a line to show a

continuation for want of better information, and that distance is 250 feet on a vertical, and probably 400 feet on a horizontal east and west line."

To indicate the theory upon which the defendant rests in this case, the witnesses, Wiley and Blood, are forced to say that the Crescent Fissure (which they prefer to speak of as the Crescent Vein) is at any point as thick as is indicated by the ore running into the beds, and state that at any point, no matter how far out it runs, it is still a part of the fissure, thereby indicating a purely theoretical and geological definition to the word "fissure" and the word "vein," as distinguished from the practical definition of the miners who worked the ore.

Mr. Blood testifies as follows (Rec. 125):

"If this tabular body of ore which is just above the 1600 horizon were extended for 50 feet further, that would still be a part of the Crescent Vein. If it were extended 150 feet further it would still be a part of the Crescent Vein. If that is the only physical fact that has a bearing upon the situation. If it extended 500 feet further in its direction, I know that it would cut, to my satisfaction, I know that it would cut other fissures in this country, of which there are several more or less parellel with the Crescent Fissure. Then there would arise, to my certain knowledge, physical facts that would complicate the question, and I would not state whether or not I would consider it a part of the Crescent Fissure or Crescent Vein.

"I have not extended the foot wall of the Crescent Fissure out to include a bedded vein as a separate bedded vein. The ore making in the beds in the foot wall of the Crescent Fissure at the place indicated on Exhibit D-D, in my opinion, is a part of the Crescent Fissure. It is a deposit in the

limestone genetically connected with the Crescent Fissure and replaced the country rock along the bedding at that particular place where it is probably connected with it, and there are instances of country rock eaten out more nearly parallel with the orginal fissure or vein—being an enlargement of the fissure.

"When I find that ore making between these walls of the fissure there I have got the vein. When I find that ore in place and not dragged in I conclude it has been deposited originally there, and when I find ore in the beds showing no signs of being dragged there, I consider that that has been placed there as a primary deposit or a secondary deposit, and not as a mechanical drag."

Mr. Wiley testifies (Rec. 149) as follows:

"The country in which lies the Silver King mine is a stratified country, mostly sedimentary deposit, quartzite and limestone and shales, and they have a dip toward the northwesterly, about the direction of the strike and dip of these beds as compared with the general strike and dip of those beds here in Crescent Hill. There is some difference in places. I do not recall the exact details of this examination six years ago, but there is some difference between it and the Crescent. There is ore in the beds and ore in the fissure. In the main the ore bodies of the Silver King lie at or near the contact of limestone and quartzite. The name "bedded vein" describes it, independent of the Silver King deposit. I would like to say that the main ore of the Silver King mines, as I have seen it, does come from what we usually determine and term as a bedded vein, lying near the contact of the quartzite and in the lime; but if I may go still further and say from my own knowledge of the Park City district, I have seen in fissures distinct and clear, so much larger ore bodies

than I ever did see in the Silver King mine in the bedding.

"A fair definition of a bedded vein is one which, as it lies in the sedimentary deposit, is conformable as to its dip and as to its strike with the sedimentary bed, and has continuity enough to constitute a vein. The main thing would be continuity."

The testimony of the plaintiff was based upon such observations as could be made in the openings which were accessible in the territory covered by the map at or about the time of the trial. It will be remembered that a very large portion of the workings shown upon the maps were caved and filled and it was impossible for anyone to visit them. In so far, therefore, as the testimony of Brooks, Gitsch, Kearns and Dailey was found upon these maps, it was practically impossible to subject their testimony to adequate cross-examination, and absolutely impossible to meet that testimony so far as it depended upon the recollection of from ten to twenty years as to the occurrences of ore. Nevertheless, the witnesses for the plaintiff did examine the Elephant Stope, the Columbia Raise and other workings leading to the apex of the Crescent Fissure, and were prepared to and did give their explanation of the occurrences of ore found therein. Their testimony showed, as we think, conclusively, that the Crescent Fissure is a fault and that it is not mineralized, excepting as it has by faulting action dragged into the porphyry which composes it, the masses or particles of ore from the bedded veins which it intersects and cuts. The fact, which is undisputed and recognized by the court

in its opinion that no ore whatever is developed in the hanging wall shows conclusively that there has been a very considerable faulting—how much it is impossible to say. Witnesses for the plaintiff point out places where the ore beds are bent down from their normal position into the fissure, which would undoubtedly be the case in the instance of a normal fault, that is to say, a fault where the hanging wall moves downward relatively to the foot wall.

Mr. Boehmer was an experienced engineer and geologist. His testimony as to the conditions existing is concise and clear and no good purpose could be served by repeating it in this brief. It is found in the record at pages 162 to 172.

The engineers of the plaintiff called attention to the facts indicating clearly that the Crescent Fissure is a faulting fissure. There is no denial of this upon the part of the engineers of the defendant. They are silent in respect to it, but evidently do not care to admit such to be the case. Both Boehmer and Wilson, on behalf of the defendant, call attention to the fact that on the foot wall of the vein the beds of lime were tilted down and bent over at the Crescent Fissure, a condition which could only exist if there had been movement on the plane of the fault and that movement a relative falling of the hanging wall. Mr. Boehmer (Rec. 162) says:

> "I take it that the fissure, as I have described it, is a vein different from the ore beds in the limestone, as I have described them, because the vein of ore in the limestone has its own and entirely

different dip or strike from the fissure which might have brought up the mineralizing water; it has different walls; it has different contents, because I have found that even in limestone in the same rocks where the mineralizing waters had deposited ore against the basset edges, in the fisure or in the fracture, where I will say in the first place that nature seems to deposit ore of a different character than it does in the limestone beds found within the stratification. I therefore find a different ore in the ores that are deposited in the limestone with the bedding from the ores deposited in the limestone across the basset edges of it."

He made and introduced in evidence sketches showing the cutting off of the ore beds by the fault, and the bending of the beds at the contact with the fissure (Rec. 169).

"Another small section which was made at some distance below this one, in the drift which was called F, I have shown that because it illustrates fully underground the ore in red coming into the end of the drift, not at the normal dip, as it was originally with the limestone beds, but in the opposite direction, of about 20 degrees, and then cut off by the fault fissure like a piece of cheese cut with a knife. There is no great bending there, but the fissure cuts through and cuts the ore off together with the limestone, bending them to 40 degrees at that point anyhow. In the same drift there are shown two yellow streaks which I interpret to be also fault fissures—that is a part of the main one. These big faults rarely occur on one fissure. Wherever there is a bending, either on the dip or in the strike of it, they naturally, in the nature of things, produce two or three fissures parallel, one moving 1000 feet and the next one 100 feet, and the next 100 feet again, in different steps—they call

it step faulting, a well-known fault in all faulting, and to this fact, these step faults, I attribute as much as any other cause, the grinding and the bending of the rocks towards that fissure."

Mr. Boehmer speaks of the contents of the fissure as characteristic of a faulting fissure. He says (Rec. 170):

"Now, the contents of this fissure are remarkable, and convince me that the fault must have been a thousand or several thousand feet, because it is filled with a mass of ground up, finely ground porphyry and limestone, to a thickness I have rarely seen. It is characterized by that filling everywhere, everywhere except where the fissure opens to cut a vein of some kind. That fissure, even in a small fissure, even at the Constitution Tunnel, has been cut off in that neighborhood, and where it has been cut off it is about the only place in that Constitution Tunnel that you can find ores. I attribute the value to the cut-off of that fissure more than to the original contents of the fault fissure, and so assays surely can be found where a vein and where the ore has been dragged into the fault fissure, but it can be also found in other places by carefully looking.

"That is thrown by the atmospheric agencies and by erosion on top of the hill. There is a dissolving of the metals in the vein, most of it being carried away (——) the waters, but a great deal of it filtering down into the vein, in fact, enriching to a certain degree the vein itself, as a rule. It is a well known secondary enrichment."

As to the significance of ore found within the Crescent Fissure, he further testifies (Rec. 170-171) as follows:

"Now, this ore, this vein having no ore within it except where it has cut some other veins, it is

rather difficult to find ore where you can get any assay value, but some of it has filtered down, migrated from one place to another. So that assays can be had in certain places, if you know how to look for them, but if you take a general course of samples in an unbiased way, you will get nothing out of that mud—and it is nothing but mud that fills that fissure, except in places where the ore is dragged into it. I would conclude, as I have described, that the fissure veins and the ore beds in this district existed first; that later the mountains were lifted and the fault occurred, and that this is one of the master faults of the district which cut through the mountain indiscriminately and went along the line of the porphyry dike, which was a line of weakness, but it did not follow it exactly under the porphyry or over it, but slashed through it wherever it bellied out, and that is where we find ore (draffed) into that fissure. It might be called a vein, although, in my opinion, it could not be called a vein, because I know of examples—I have seen many of them—in the old Comstock was an example of it."

The Elephant Stope, he tells us (Rec. 172), had its end about 190 feet from the Crescent Fissure, and in this he is corroborated by Mr. Treweek (Rec. 184).

Engineer Wilson was perhaps the best qualified of all the engineers to testify as to the actual conditions in the ground by reason of his long familiarity with the Park City Mining District, and particularly with the Crescent ground, which he first visited about 1883. His testimony is clear and convincing, and emphasizes some of the features which tend to indicate the clear distinction between the Crescent Fissure and the vein in which is contained the Elephant Stope. Mr. Wilson speaks of

the tilting or bending of the beds. (Rec. 199, Rec. 200, Rec. 204.) In speaking of the characteristics of the fissure, the witness says (Rec. 202):

> "This fissure is found accompanied by more or less attrition matter—that is, the fissure has caused the adjacent rock to be ground up and making a clay in places where the fissure has cut through the beds, and it has crowded some of the beds, some of the ore of the bedded veins in it; so that you have a more or less tabular mass of attrition matter with ore in it in places, and that is the Crescent Vein as I look at it."

He calls attention to another fact which bears upon one clear distinction between the two veins, namely that the Crescent Fissure is lean and poor and yields no ore save as it comes in contact with bedded veins, and the other the bedded vein yields large quantities of rich ore, or at least ore that is noticeably rich and worth saving. This fact pertains to the Kermit Drift on the extreme left hand of the map, Exhibit "A," and westerly from the Elephant Stope. This Kermit Drift is reached through the Teddy Drift, which is in the foot wall of the Crescent Fissure. The Kermit Drift extends far beyond the limits of the map, but is absolutely valueless as far as mineral contents is concerned. This fact was not denied by the defendant. His conclusion is clearly stated (Rec. 208), as follows:

> "Q. I will ask you whether, in your judgment, the ore appearing in the vein, the bedded vein, of which the Elephant Stope is a partial development, is the same vein or a separate vein and deposition of ore from any of the ore which appears in the Crescent Fissure at any point?

A. It is entirely separate; has a different angle of dip, practically dipping at right angles, and what little ore may be in the Crescent Fissure may have been from the movement of the fault plane. can there be any reasonable doubt upon the part In following down the fissure, there is no place, nor of any person, any miner, as to when he is within the fissure and when he is outside of the fissure."

A very long and searching cross-examination of Mr. Wilson was had, which brings out with clearness the reasons for distinguishing between the fissure and the bedded veins in this territory. He calls special attention to fissures which are found at various points cutting up through the beds at a different strike and dip from the Crescent fissure, which are typical feeding fissures and which, in many instances, furnish in all probability some of the ore which is dragged into or found disseminated in the porphyry of the Crescent Fissure.

The witness, O. A. Palmer, is also a mining engineer, thoroughly familiar with the Park City District, and his testimony is that the Crescent Fissure, on its course to the southeast, is found for a long distance from the Alliance Tunnel (Rec. 240):

"The fissure itself, so-called Crescent Fissure, on its course to the southeast, is found for a long distance from the Alliance Tunnel. From that it crosses the Anchor Tunnel and appears again in the Daly and in the Ontario, and passes along in its course westerly a long distance through the Ontario, but not quite to the limits on the east. The fissure there is practically barren. It cuts the Ontario and the Daly and has a little ore in it that is dragged in, but through the places we have found that fissure it is prac-

tically unmineralized except by such as has been dragged in by the cutting of these older ore bodies; but on (on) the fissure on the east end of the Ontario are two fissures of a series that probably was the latest of everything in that district, later than the mineralization and later than the porphyry even."

In respect to the evidence that the Crescent Fissure is a faulting fissure, he says (Rec. 242):

"The hanging wall of the fissure is evidence that it was a fault fissure from the fact that it cut all the dikes and all the lime beds. It has cut the lime beds that carry the ore in the Elephant Stope. On the hanging side of that fault fissure the corresponding beds to the Elephant Stope are not in sight; they are not found. They have been misplaced—thrown up or thrown down and I have no doubt (what) what it is a downward movement and a normal faulting."

As to the extent of this master fault, he says (Rec. 243):

"The country has been cross cut so often through the Ontario and Daly that I think there can be no doubt whatever of these various points at which we have the fault fissure, that it is the same fault fissure, and, as stated, my opinion is that this Crescent Fissure is the same one; but when you leave the Daly ground and go towards the Alliance, in which I think is identically the same fissure, there is a space of ground undeveloped and through that it is a matter of inference to a certain extent. Now, in the Anchor tunnel, it crosses there—then it is picked up in the Alliance, but the distance between the Alliance and the Anchor is several hundred feet, and in that distance there is no development, and there it is a matter of conjecture as to its being one and the same; but in

the absence of being able to fit any two together as having the same general conditions, the cross cutting of the country in various places all indicate a series of fissures such that we would be in doubt how to correlate them, I think there is little or no doubt left that it is identically the same fissure."

And further, in explaining the difference between the beds and the fissure, he uses the following language:

"When I speak of this Crescent Fissure as being a non-mineralizing fissure, I mean it has no mineralization of its own; it is that which has been dragged into it, just the result of cutting ore bodies previously existing in other beds, and other fissures, as the case may be. From my opinion and description of the genises of this particular vein or fissure, I would not expect to find, nor do I find, any mineralization outside of the walls of this fissure, either upon the hanging or the foot wall side, excepting such mineralization as comes from other and bedded veins. There is mineral in various places, ore in various places as you go down the incline, that appears to make into the bedding; there is some in the fissure itself scattered here and there which is enclosed within the walls of the fissure, but from all appearances was not deposited there originally, but is simply dragged from bodies lying above or below in the beds, or in other fissures, if it cuts other fissures."

The testimony of the witness, Nicholas Treweek, is important and instructive. It is quite extensive, owing to the fact that he went largely into the history of the development of this Crescent Fissure through the workings known as the Hananer Tunnel and the Alliance Tunnel. The corporations which were managed and directed by him did thousands of feet of work upon these

veins and he had occasion to examine carefully the characteristics of the vein at every foot of this development. In giving the characteristics of the Crescent Vein, he says (Rec. 175):

> "The filling of the fissure at the various places where I saw it is fractured soft material, carrying a great deal of clay and mud, and it would be very difficult to carry on the work, particularly if you are raising on it, without getting into serious trouble in the way of caves. So that it was necessary, in the extension of this Columbia raise, to keep away from the fissure, to keep underneath it, so as to get these connections through. If you would undertake to raise on it, why, it would be liable to run down, or slide down on you, as was demonstrated in the Mahoney raise when they were raising on the fissure at a given point on the section, they lost a part of the raise which had been done at one time and run out southwest a short distance, to start a new one. It is a very difficult matter to raise on that fissure. • • •
>
> There is mud in the fissure all the way in the Hanauer Tunnel out where we run along it, and in what is called the Crescent Fissure as developed in these workings under consideration. There is very little difference in its appearance as to the distance that it runs there; it was continued after we got through with it clear on to the top of the K. K. incline. Its characteristics are about the same as it was of this muddy clayey material. I have no doubt but what it is the same fissure in other places. Taking the Hanauer Tunnel from the place where you first struck it, after I had made this detour to the southerly and struck it at station 34, as described, from there on for the whole distance which I ran in the fissure, it did not produce any ore. The only mineral indications were more or less stained clay, with a reddish appearance, but it was illusive and deceptive as to

ore; it lacked the cementation, and the banded structure; it partook [illegible] the surrounding walls and there was nothing in the way of crystallization. We did not find enough fragments or occurrences of ore to make an assay on that piece of work; I don't believe, put it all together, there was five hundred pounds of ore taken out."

The witness also introduced and identified photographs, Exhibits 13, 14 and 15, which, with the map, Exhibit 16, show the contour of the easterly end of the Buckey and Pinyon Extension Claims.

The witness, also, from his familiarity with the maps and his practical ability to survey and plat, drew and introduced in evidence Exhibit 17, which shows a cross section through the line of the Aetna Tunnel at the extreme right of the map, Exhibit A, showing the relation of the Crescent fissure to the Crescent ore body and the Hannauer Tunnel. We direct special attention to this exhibit as illustrating the conditions there found, and, as we insist, the folly of attempting to claim the Crescent bedded ore bodies, extending for a thousand feet or more to the northerly, as a portion of the faulting Crescent Fissure.

His conclusion from all his experience and study of the ground and from the facts brought out in this case is given at Record 185:

> "From my observation of the Crescent Fissure, wherever I have had an opportunity to see and study it, and from its contents and from the occurrences of the ore in the neighborhood of the Crescent Fissure and observable in particular workings in and through the fissure, my conclusions

are that it is a fault fissure. In brief, my reasons for thinking so are as follows: I don't think that the fissure has done any of the mineralizing whatever, but that the ore bodies that we find there in the Elephant Stope in these beds to be entirely made up from the fissure system, with the solutions as they come through and have replaced the lime. It has been a very slow process, and taken a very great period of time to do so, particle by particle, and that is the course of it with the waters containing the mineral solutions that these ore bodies have been formed. The fissure itself is filled up with material that has nothing cemented or banded about it. It lacks the characteristics of a vein and is composed of broken matter filled up with clay and mud, so that you cannot carry your work though on it, because it would slide down and because of caves. And even if it was banded, there would be great danger from hanging ground and you would have to mine it by picks and dynamite, and it comes away too fast. It is loose material, everything indicating a fault. The surface on top indicating a fault. There is a bed of quartzite lying to the southeast which can be seen in shaft Nos. 1 and 2, and there are millions of tons lying back on the ridge back of the line of the fault, blocks of quartzite that will weigh ten tons, and none to the northwest, so that is a natural demonstration that there is a fault there; and it is not of a few inches. In my opinion it is one of the master faults of that great district, and next in importance to the great north and south which cut off the Ontario mine on its extent."

We believe that the Court manifestly erred in this case in resolving the question of the identity of the two veins against the plaintiff and in favor of the defendant. It was a doubtful question at most, as conceded by the

Court, and that doubt should have been resolved against the defendant and not in its favor.

Again we have occasion to say that the mere fact that the Crescent Fissure is a faulting fissure and that it has tilted the beds and that it is lean in ore and that it has never been profitable, although thousands of feet of work have been done upon it, and many thousands of dollars expended in exploiting it, do not of themselves control. If, in spite of this, the Elephant Stope is a part of the fissure or a part of the fissure vein, and if, in spite of the hundreds and thousands of feet of stoping which have been done in the bedded veins which are physically connected with the Crescent Fissure, they are still a part of that fissure, then the decision of the Court was right; but what we insist upon is that all of these facts, namely, the dip of the fissure, its walls, its contents, its lack of profitable ore, everything shall be taken into consideration and compared with the characteristics of the bedded vein; and above all we insist that the judgment of the practical miner who never at any time was at a loss as to whether he was working in a bedded vein or in a fissure, should control upon this question.

We call attention to figures 2 and 3 which will serve to illustrate our argument upon this point. As we have said, there is no question made by the defendant's engineers that this is a faulting fissure. There is no question made that there has been a throw or displacement along the fissure and the positive judgment and opinion of Mr. Wiley, Mr. Boehmer and Mr. Palmer upon this subject, with the facts which they marshal in support of it, should leave no doubt upon this question.

There is no dispute that the Crescent Vein as distinguished from the Crescent Fissure, that is to say, that vein which contains the large flat ore bodies shown on Exhibit G G, and on the easterly portion of Exhibit A, is a bedded vein. There is no dispute that the Elephant stope if it were not in close proximity to the Crescent Fissure would be regarded as a bedded vein. Indeed, counsel for the defendant at the trial announced that it was not disputed that the Elephant Stope was a bedded ore body. (Rec. 206.) There is no dispute that the Crescent Fissure is a typical fissure in the limestone and that its predominant characteristic that it carries prophyry, mud, and crushed up material which no one has ever claimed could be found within the bedded veins or ore bodies. It is not disputed that the dips of these two veins are at right angle to each other. There should be no dispute, and the Court so finds, that the Crescent Fissure is not highly mineralized. There is no dispute that the ores as a rule have come from the bedded deposits.

Under the great weight of the testimony in this case, as we insist, a section upon a plane drawn through the ground in controversy would be aptly shown by the illustration, Fig. 2. We have represented in this the Crescent vein, the Elephant vein and the Crescent fissure at a time contemporaneous with the formation of the Crescent fissure and before any faulting had occurred. We show in this illustration "verticals" typical of the vertical fissures which are found in the ground and which as our engineers insist, are the source of mineralization of the bedded veins.

No one would have the hardihood to contend under the conditions shown in Fig. 2 that there were not three distinct veins, each subject to separate location,—the Crescent vein, the Crescent fissure and the Elephant vein. We are assuming when we speak of a location upon the Crescent fissure, that it would contain at this time sufficient mineral or indications of mineral to warrant a location upon it, although this certainly would not be the case prior to any movement on the plane of the fissure.

We next illustrate in Fig. 3 the conditions as they exist at the present time after the displacement has taken place along the plane of the Crescent fissure. It seems clear that if the Crescent Vein under Fig. 2 was a separate and distinct vein from any that could be claimed in the Crescent fissure, it is equally so under the conditions

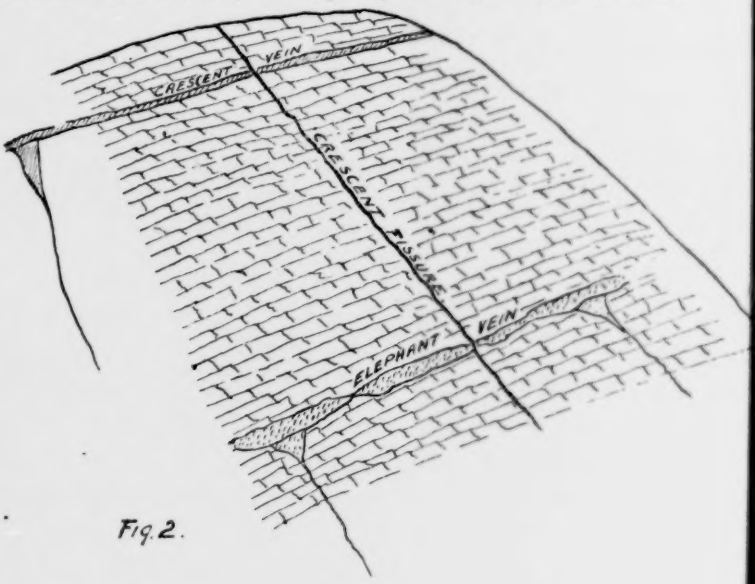

Fig. 2.

illustrated by Fig. 3; so also in respect to the Elephant vein. The Crescent vein would have a distinct apex at the point where it is cut by the Crescent fault fissure. So also the Elephant vein is a separate vein having its apex at the point where it is cut off by the Crescent fissure.

It is not necessary for us to determine what might be the method of locating the Crescent vein or the Elephant vein. It is sufficient for our purposes to demand that the defendant in this case prove the identity of *its* vein with the ores of the Elephant vein as we contend it exists in the ground. For reasons to which we have called attention, there is no ground for supposing that the Elephant stope determines the limits of the Elephant vein. If this vein should continue upon its course until

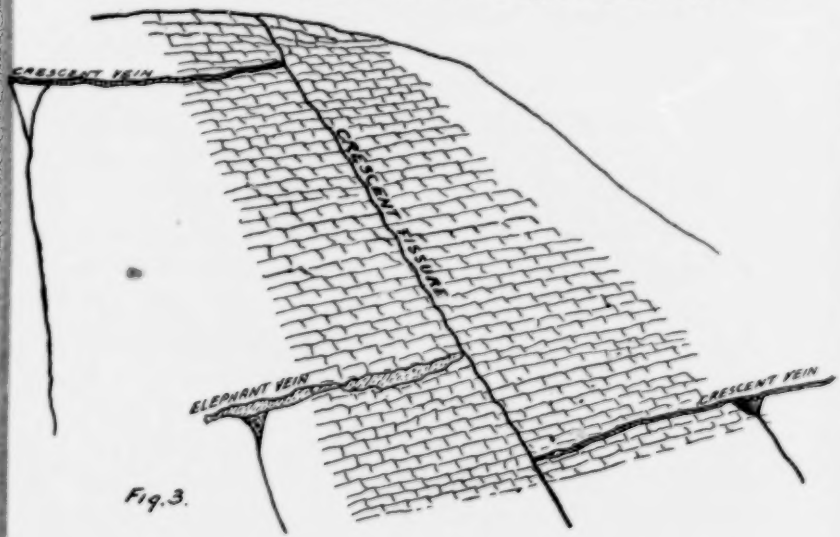

Fig. 3.

by further development it shall be shown to be as large as the Crescent vein in the upper workings, it will only serve to prove the absurdity of the contention that it is included within and a part of the Crescent fissure.

The mere fact that uncertainty exists in respect to the ownership of the ores along the foot wall of the Crescent fissure at the places where the Crescent vein and the Elephant vein are cut by this fissure, is no argument against the position for which we contend. The very condition of affairs which is illustrated in Fig. 2 is fully covered by the provisions of Section 2336 of the Revised Statutes, which provides that where two or more veins intersect or cross each other, priority of title shall govern and such prior location shall be entitled to all ore or mineral contained within the space of intersection. So if any of the ores of the Elephant vein or other veins cut by the Crescent fissure were found to be dragged into the fissure opposite the Elephant vein so as to become mingled with them, and if the location covering the Crescent fissure were the older, the title to the ores at the intersection would undoubtedly follow the title of the Crescent fissure.

This whole matter is simply a question of identity of veins. It is treated with great clearness by Mr. Lindley. (2 Lindley on Mines, Section 615.) We call special attention to the illustrations which accompany the text, and particularly to the quotation therein contained from the decision rendered by the Supreme Court of Montana, speaking through Judge Hunt, in Butte & Boston Mng. Company vs. Societe Anonyme des Mines de Lexington, 23 Montana 177.

Referring again to Fig. 3, if, as is most probable, in further development of the Crescent fissure it shall be found that the Crescent vein or the remainder of the Crescent vein exists in the hanging wall of the Crescent fissure, it certainly will not be contended by the owner of the Crescent fissure that it has the right to follow such vein upward upon its dip as a part of the Crescent fissure. If, as may be possible, the apex of this suppositious Crescent vein shall be found to the eastward and the owner of it shall follow it down until it intersects with the Crescent fissure, it certainly will not then be contended that it is a part of the Crescent fissure. If the vein in the hanging wall is separate from the Crescent fissure, we see no logic in contending that the remaining portion of the same vein has a different identity when found in the foot wall country.

It may be suggested that it is difficult to determine just when a vein becomes a bedded vein; and particularly with reference to certain deposits shown at drift F, drift E and Engine drift along the Columbia Raise it is difficult to determine whether these ore bodies not yet developed are drag ores within the Crescent fissure or are bedded deposits. In answer to this suggestion we have to say that whether a vein is a bedded vein or not is a question of fact. A body of ore found in limestone such as composes the foot wall of the fissure in this case, becomes a bedded vein capable of recognition, location and separate ownership at the instant when it can be said as a matter of fact that in form it is determined by the strike and dip of the lime beds in which it is found, and when also in extent it

is of sufficient size to warrant its being denominated a vein, and when in respect to its characteristics it differs from other veins and from the country rock sufficiently to warrant its location under the Act of Congress as a mineral vein.

To recapitulate our argument under this heading, we contend that the question here is merely one of identity of veins. It is a mixed question of law and fact. Under the facts as they are not disputed between the parties, we think the trial court erred as a matter of law. In so far as there is any dispute upon the facts, we believe the court drew incorrect deductions and that he failed to determine in accordance with the evidence, the controlling question of the identity of veins, or to compel the defendant to assume and prove the burden of showing such fact.

III.

Extralateral Rights of Petitioner Through the Located End Lines of the Monroe Doctrine, Cumberland and Constitution Lode Mining Claims.

The respondent being the owner of the Conkling Lode Mining Claim the Elephant Stope ores belong to it under its common law rights. The burden is upon the petitioner to maintain its asserted extralateral rights growing out of its ownership of the apex of the vein which contains the ore.

Conceding for argument's sake that the ores do belong to the Crescent Fissure vein, which has its apex within the Monroe Doctrine, Cumberland and Constitution claims of petitioner, the petitioner cannot prevail be-

cause under no circumstances can it follow this vein through the located end lines of the claims. If such be not the law, it still cannot prevail for two reasons; first, because of the fact that the Crescent Fissure is an *incidental* vein and the *original* vein is the one which fixes the end lines of the claim for all veins and the *original* vein ran lengthwise, not crosswise of the claims; and, second, because even if it be found or presumed as contended by petitioner that the original vein ran crosswise, not along the claims, the position of the Crescent Fissure with reference to the discovery points fixing the locus of the *discovery* or *original* vein is such as to preclude extralateral pursuit. These propositions are separately discussed.

1. *The respondent has no title to the ore bodies in dispute by reason of its ownership of any vein having its apex within the Constitution, Cumberland and Monroe Doctrine Lode Mining Claims for the reason that under no circumstances has the owner of a vein which has its course or strike crosswise, instead of along the location, the right to follow such vein extralaterally through the plane of the located end line.*

The question here presented has never been decided by this Court.

In Flagstaff Silver M. Co. v. Tarbet, 98 U. S. 463, the doctrine of this Court is fully established that where a locator in laying the lines of his claim failed to carry out the plain intent of the statute and so laid his lines that the vein upon the surface crossed the side lines of the claim these side lines became, for the purpose of limiting his right of extralateral pursuit, his end lines, and

vertical planes drawn through these lines limited the right of extralateral pursuit along the course or strike of the vein. The language of the Court is:

> "• • • the intent of both statutes is, that mining locations on lodes or veins shall be made thereon lengthwise, in the general direction of such veins or lodes on the surface of the earth where they are discoverable; and that the end lines are to cross the lode and extend perpendicularly downwards, and to be continued in their own direction either way horizontally; • • •"

The question arose in that case as to the right of the locator to pass beyond the plane of the line which the Court declared, for the purpose of that action, to be the end line of the claim, and no occasion arose to declare, nor did the Court declare, as to the rights of the locator upon the vein on its dip beyond the plane of the located end line.

Eight years later, in 1887, Argentine Mining Co. v. Terrible Mining Co., 122 U. S. 478, was decided. A diagram of the claims and the premises in dispute is shown by Mr. Lindley, 2 Lindley on Mines, Section 587, and the holding of the Court in this, as well as in the Flagstaff case, is accurately stated by him as follows:

> "Manifestly, the Flagstaff and Argentine cases were parallel as to the facts, the Supreme Court of the United States having in the former case emphasized the controlling force of surface lines as fixed by the patent, and established the rule that when the lode crossed a line which the locator called a side line such line became in law an end line, to the extent, at least, that the lode could not be followed beyond it. The application of the

same principle to locations made under a law which required, as a condition precedent to a valid appropriation, the defining of a surface and marking of boundaries, including the discovered lode, was logical and consistent."

After quoting the Flagstaff case the Court states the precise point decided, as follows:

"Such being the law, the lines which separate the location of the plaintiff below from the locations of the defendant, are end lines, across which as they are extended downward vertically, the defendant cannot follow a vein even if its apex or outcropping is within its surface boundaries, and, as a consequence could not touch the premises in dispute, which are conceded to be outside of those lines and outside of vertical planes drawn downward through them."

Fifteen years after the decision in the Flagstaff case, King v. Amy and Silversmith M. Co., 152 U. S. 222, was decided. It is manifest that the point here involved was precisely that involved in the Flagstaff case, although that case is not cited in the opinion. Here, again, there was no occasion for the Court to determine the right of the owner of the Amy Claim, the vein being located crosswise of that claim, to pursue it extralaterally through the located end line. In the opinion, however, the following language is used:

"The most that the Court can do where the lines are drawn inaccurately and irregularly, is to give to the miner such rights as his imperfect location warrants under the statute. It cannot re-locate his claim and make new side lines or end lines. Where it finds, as in this case, that what are called *side lines* are in fact *end lines*, the Court, in de-

> termining his lateral rights, will treat such side lines as end lines and such end lines as side lines; but the Court cannot make a new location for him, and thereby enlarge his rights. He must stand upon his own location and can take only what it will give him under the law."

The foregoing is the first appearance of the *dictum* to the effect that the Court will treat "such end lines as side lines," a statement which has given rise to great uncertainty as to the proper interpretation of the statute.

The next case in which this statement, or its equivalent, appears is Last Chance Mining Co. v. Tyler Mining Co., 157 U. S. 693. The diagram accompanying the opinion shows the ore bodies in dispute within the located lines of the Last Chance Claim. The line of the apex of the vein in which these ores are found is shown crossing the located side lines of the Last Chance. The vein also courses lengthwise of the Tyler Claim and is found within the planes extended of the located end lines of that claim. The ownership, therefore, of this ore body depended upon the priority of the two claims since they were within the intralimital rights of the Last Chance and the apparent extralateral rights of the Tyler. The Court found it necessary to cite the Flagstaff case, the Argentine-Terrible case and the King-Amy case. There was no discussion by the Court and its holding upon the point here in question is comprised in the following language:

> "The course of this vein is across the Last Chance claim instead of in the direction of its length. Under those circumstances the side lines of that location became the end lines, and the end the side lines."

Here, again, appears the balanced phrase "side lines became end lines and end lines side lines," the latter part of which had no relevancy to the matter in dispute.

The phrase re-appears in two cases decided in May, 1907. These are Del Monte M. & M. Co. v. Last Chance M. & M. Co., 171 U. S. 55, and Walrath v. Champion Mining Co., 171 U. S. 293. In the latter of these cases it appears merely in an extended quotation from the former and in neither of the cases was the office or effect of a located end line, in cases where the vein crossed the side lines, involved or brought in question.

In the Del Monte case the point involved was embraced in the fourth question certified to this Court by the Circuit Court of Appeals in the Eighth Circuit, which is as follows:

> "If the apex of a vein crosses one end line and one side line of a lode mining claim, as located thereon, can the locator of such vein follow it upon its dip beyond the vertical side line of his location?"

Justice Brewer refers to the Argentine-Terrible and the King-Amy cases and commenting upon them, says:

> "All that can be said to have been settled by them is, first, that the lines of the location as made by the locator are the only lines that will be recognized; that the courts have no power to establish new lines or make a new location; second, that the contemplation of the statute is that the location shall be along the course of the vein, * * * and third, that when subsequent explorations disclose that the location has been made, not along the course of the vein, but across it, the side lines of the location become in law the end lines."

However, he concludes the discussion of the point under consideration with the following statement:

> "Our conclusions may be summed up in these propositions: First, the location as made on the surface by the locator determines the extent of rights below the surface. Second, the end lines, *as he marks them on the surface*, with the single exception hereinafter noticed, place the limits beyond which he may not go in the appropriation of any vein or veins along their course or strike. Third, every vein 'the top or apex of which lies inside of such surface lines extended downward vertically' becomes his by virtue of his location, and he may pursue it to any depth beyond his vertical side lines, although in so doing he enters beneath the surface of some other proprietor. Fourth, the only exception to the rule that the end lines of the location as the locator places them establish the limits beyond which he may not go in the appropriation of a vein on its course or strike is where it is developed that in fact the location has been placed, not along, but across, the course of the vein. In such case the law declares that those which the locator called his side lines are his end lines, and those which he called end lines are in fact side lines, and this upon the proposition that it was the intent of Congress to give to the locator only so many feet of the length of the vein, that length to be bounded by the lines which the locator has established of his location."

Here, again, the expression "those which he called end lines are in fact side lines" was not any part of the decision of the Court. Even if we may allow the necessity or propriety of re-naming the located end lines in order to distinguish them from the located side lines under their new relation, this would not involve the neces-

sity or the propriety of defining the office and function of such located end lines under such abnormal conditions.

In the Walrath-Champion case the claims were laid along the veins as the law directs. The doctrine of the Flagstaff-Tarbet case was, therefore, not involved. The Court, in its opinion (p. 308) in discussing the question as to which of the various lines of the Providence Claim should be regarded as its end lines for the purpose of limiting the rights upon a secondary vein, found it convenient to quote in full the four propositions laid down by Justice Brewer in the Del Monte case.

The four cases above referred to are the only ones in which this Court has expressed any opinion as to the rights of a locator to extralateral pursuit of his vein beyond the located end lines, where by legal construction the located side lines have become the end lines of his location.

We make no apology for referring to these expressions as *dicta* and for presenting the question here involved for the first time for the consideration of this Court. The respect due to *obiter dicta* is indicated in Cohens v. Virginia, 6 Wheat. 264-399, where Chief Justice Marshall says:

> "It is a maxim not to be disregarded that general expressions in every opinion are to be taken in connection with the case in which those expressions are used. If they go beyond the case they may be respected, but ought not to control the judgment in a subsequent suit, when the very point was presented for decision. The reason of the maxim is obvious. The question actually before the Court is

> investigated with care and considered in its full extent; other principles which may serve to illustrate it are considered in their relation to the case decided, but their possible bearing on all other cases is seldom completely investigated."

In the great case of Pollock v. Farmers L. & T. Co., 157 U. S. 429, the doctrine of the foregoing was affirmed and another decision quoted with approval, as follows:

> "So in Carroll v. Carroll, 57 U. S., 16 How. 275, 286 (14; 936, 941), where a statute of the state of Maryland came under review, Mr. Justice Curtis said: 'If the construction put by the Court of a state upon one of its statutes was not a matter in judgment, if it might have been decided either way without affecting any right brought into question, then, according to the principles of the common law, an opinion on such a question is not a decision. To make it so, there must have been an application of the judicial mind to the precise question necessary to be determined to fix the rights of the parties and decide to whom the property in contestation belongs. And therefore this Court, and other courts organized under the common law, has never held itself bound, by any part of an opinion, in any case, which was not needful to the ascertainment of the right or title in question between the parties."

The statute under construction is a federal statute, being the law not for one but for all the mining states, and as pointed out by Justice McKenna in Calhoun Gold Min. Co. v. Ajax Gold Min. Co., 182 U. S. 499, a federal statute has more than a local application and until construed by this Court cannot be said to have an established meaning.

The question here involved is one as to which courts and text writers are at variance. No case has arisen in

any of the Circuit Courts of Appeal in which it has been decided so far as we are aware. The principle was conceded by counsel for both parties and adopted by the Circuit Court of Appeals of the Ninth Circuit in Bunker Hill & Sullivan etc. Co. v. Empire State etc. Co., 109 Federal 538. This happened because both parties to the action claimed the ore bodies in dispute through the right of extralateral pursuit through located end lines.

In the case at bar the Circuit Court of Appeals of the Eighth Circuit, Conkling Min. Co. v. Silver King Coalition Mines Co., 230 Fed. 561, did not find it necessary to decide the point for the reason that it determined, as a matter of fact, that the discovery vein coursed along and not across the locations of the Constitution, Cumberland and Monroe Doctrine, and therefore that the end lines in question were in law and in fact the end lines of the several claims.

Three Circuit or District Courts of the United States have felt themselves constrained to follow the *dicta* of this Court in the cases above referred to. One only of these cases was reported. It is the opinion of District Judge Townsend of the District of Connecticut, in a ruling on demurrer to a complaint upon a contract relating to mining claims in Arizona. The same holding was made by District Judge Marshall in Keely v. Ophir Hill Consolidated Mining Company and followed by him in the case at bar, as appears from his opinion, Record 3977, page 262, in which the following statement occurs:

> "This vein crosses the located side lines of the defendant's claim. Does the ownership of the

apex give any extralateral right? In the case of Keely v. Ophir Hill Con. Mining Co. I gave the reasons impelling me to conclude that where the vein in question is the discovery vein the side lines crossed by the vein becoming (become the) end lines and that an extralateral right exists. Notwithstanding the argument for the plaintiff here I have not changed my opinion."

In the Keely-Ophir Hill case the opinion of the Court upon this subject was as follows:

"There is no decision that sustains a denial of extralateral rights on the Bartlett. The only decided case is contra, Empire M. & M. Co.-Tombstone M. & M. Co., 100 Fed. 910. Beyond this the quantity of *dicta* in the decisions of the Supreme Court of the United States supporting the conclusion reached in the case cited is so great, that a subordinate court should only reach a contrary conclusion on the clearest grounds. Such grounds do not exist in my opinion."

In Catron v. Old, 23 Colo. 433, 48 Pac. 687, the Supreme Court of Colorado, in 1897, after the decisions of the King-Amy and the Last Chance-Tyler cases, and after citing the latter case, makes use of this language, arguendo, the point not being involved:

"And it is equally well settled that when the strike of the vein is across the side lines of a claim no extralateral rights are acquired by reason of the ownership of the apex."

See, also, Stewart M. Co. v. Ontario M. Co. (Ida.), 132 Pac. 787.

It was contended in the Circuit Court of Appeals by petitioner that the Ninth Circuit Court of Appeals in Last Chance Mining Company v. Bunker Hill M. & C. Co.,

131 Fed. 579, has held that there is an extralateral right through the located end lines where the claim is laid crosswise of the location. It is true that the doctrine is recognized by the Court and the rights of the Bunker Hill Company are upheld upon that theory. But we do not understand that this was upon contestation. This seems to be clearly indicated by the statement of the errors assigned by the Last Chance Company (p. 588) and we understand that in all the very extended litigation carried on by this company based upon its locations in that vicinity the exigencies of the situation demanded the recognition of the doctrine adopted by the Court in this particular case.

Three leading commentators on mining law, Lindley, Snyder and Morrision, (Creede etc. M. Co. v. Uinta etc. M. Co., 196 U. S. 352,) are not agreed upon the question. Mr. Lindley cites Justice Brewer from the Del Monte case as we have quoted him, with the comment that "this leaves little else to be said." (2 Lindley on Mines, Sec. 589), Mr. Snyder (2 Snyder on Mines 721) states the holding of Judge Townsend in the Empire-Tombstone case, *supra*, and remarks, "To us this seems altogether logical, and that it is in hearty accord with the spirit as well as the letter of the law. Any other rule would be judicial legislation, and by that means deny to the mine owner what the statute plainly gives him—the right to follow his vein endlessly down on its downward course, provided he does so between parallel planes, drawn within the boundary of his own location at the surface, and containing the apex of the vein within his own ground,

and by extending such lines so as to include such outside parts."

Morrison & De Soto (Morrison's Mining Rights, 15th Ed., 218,) argue strongly and at some length that the expression "the side lines of that location become the end lines and the end the side lines" found in the Last Chance-Tyler case, is "far from a holding that extralateral rights may be pursued beyond the end line" and state that "we will never concede unless and until compelled by binding authority that by mere alliteration of language, 'side lines become end lines,' 'end lines become side lines' that the first locator can defeat the rights of such tunnel discovery, but hold that he is estopped by his record to claim the right to pass beyond what he, by his own act, has made his end lines."

Those who hold that this Court ultimately must logcillay declare the law to be in accordance with the *dicta* of the cases cited rely chiefly, if not entirely, upon the proposition enunciated by Justice Brewer in the passage quoted from the Del Monte case "that it was the intent of Congress to give to the locator only so many feet of the vein, that length to be bounded by the lines which the locator has established of his location," supported by the declaration in the Flagstaff case, which is as follows:

> "Our laws have attempted to establish a rule by which each claim shall be so many feet of the vein, lengthwise of its course, to any depth below the surface, although laterally its inclination shall carry it ever so far from a perpendicular."

But this gift of Congress to the locator and the rule which it attempted to establish for his benefit have reference to a peculiar and extraordinary right superadded to the common law rights inhering in the grant of the bounded premises. This right of extralateral pursuit was upon the statutory condition that in laying the lines of his location upon the surface he lay them so that the side lines, to-wit, the longer lines, embrace the outcrop of the vein upon its strike and the end lines cross the same so that planes drawn through the latter shall bound his rights.

This theory of the statute being followed and the conditions laid down being fulfilled the locator is to enjoy the special right conferred. Otherwise "the gift of Congress" has not been earned and the attempt to establish a rule has failed so far as he is concerned. In every case the burden lies upon a party claiming extralateral rights to show that he comes strictly within the conditions of the grant.

The Court of Appeals in this case (230 Fed. 561) states the recognized rule as follows:

> "This burden rests on every party who claims a right not common to all, which is given only when a prescribed state of facts shall exist. He must prove the existence of the prescribed facts. The Edith, 94 U. S. 518, 522; 24 L. Ed. 167."

In the case cited from this court it is said:

> "Hence, it was incumbent upon them to show that such a right existed and, by proof, to bring themselves within the exception. This is always the rule when the party claims a peculiar right

given by a statute, a right not common to all, and which is given only when a prescribed state of facts shall exist."

The holding of the Flagstaff case rightly considered merely halted the owner of the claim which had been laid in a manner not warranted by the statute from pursuing his vein through and beyond lines which, had he followed the statute, would have been his end lines. He was not permitted to enjoy a right which the statute had offered because of his violation of its fundamental principle. His intralimital rights under the location were not curtailed. The statement by the Court so much relied on that "our laws have attempted to establish a rule, etc.," was but by way of pointing out clearly wherein the rule of the statute had been transgressed and the necessary consequence. There was no suggestion that the right thus forfeited, namely, the right to follow the vein in its descent into the earth beyond the located side lines would be made up to him by the grant of another right, to-wit, the right to pursue the vein through the end lines as located. It is difficult to believe that as against the express declaration of the statute, "but their right of possession to such outside parts of such veins or ledges shall be confined to such portions thereof as lie between vertical planes * * * through the end lines of their locations" (R. S. Sec. 2322), the Court could have intended the implication which is stressed by Mr. Lindley and Mr. Snyder.

The inference to be drawn from other expressions in the decided cases is directly against this construction.

In the King-Amy and Silversmith case (152 U. S. 222, 228,) it is said:

"The difficulty in the present case arises from the course of the vein or lode upon which the Amy location was made. It is evident that what are called side lines of the location, as shown in the diagram, are not such in fact, but are end lines. Side lines, properly drawn, would run on each side of the course of the vein or lode distant not more than three hundred feet from the middle of such vein. In the Amy claim, the lines marked as side lines, cross the course of the strike of the vein and do not run parallel with it. They, therefore, constitute end lines. It is true the lines are not drawn with the strict care and accuracy contemplated by the statute, and which could only have been done with more perfect knowledge of the true course or strike of the vein from further developments. But, as was said by this Court in Iron Silver Min. Co. v. Elgin Min. & S. Co., 118 U. S. 196, 207 (30; 98, 102): 'If the first locator will not or cannot make the explorations necessary to ascertain the true course of the vein, and draws his end lines ignorantly he must bear the consequences.' The Court cannot become a locator for the mining claimant and do for him what he alone should do for himself. The most that the Court can do, where the lines are drawn inaccurately and irregularly, is to give to the miner such rights, as his imperfect location warrants, under the statute. It cannot relocate his claim and make new side lines or end lines. • • • Mistakes in drawing the lines of a location can only be avoided, as said in the case cited, by postponing the marking of the boundaries until sufficient explorations are made to ascertain, as near as possible, the course and direction of the vein."

In the Del Monte case (171 U. S. 55) the following is found at page 66: (Italics ours.)

> "It needs no argument to show that if this were the only section bearing upon the question, patents for land containing mineral would, except in cases affected by local customs and rules of miners, be subject to the ordinary rules of the common law, and would convey title to only such minerals as were found beneath the surface. We therefore turn to the following sections to see what extralateral rights are given *and upon what conditions they may be exercised.* And it must be borne in mind in considering the questions presented that we are dealing simply with *statutory rights.* There is no showing of any local customs or rules affecting the rights defined in and prescribed by the statute, and beyond the terms of the statute courts may not go. They have no power of legislation. They cannot assume the existence of any natural equity, and rule that by reason of such equity a party may follow a vein into the territory of his neighbor, and appropriate it to his own use. If cases arise for which Congress has made no provision, the courts cannot supply the defect. *Congress having prescribed the conditions upon which extralateral rights may be acquired, a party must bring himself within those conditions, or else be content with simply the mineral beneath the surface of his territory.* It is undoubtedly true that the primary thought of the statute is the disposal of the mines and minerals, and in the interpretation of the statute this primary purpose must be recognized and given effect. Hence, whenever a party has acquired the title to ground within whose surface area is the apex of a vein with a few or many feet along its course or strike, a right to follow that vein on its dip for the same length ought to be awarded to him *if it can be done, and only if it can be done,* under any fair

and natural construction of the language of the statute. If the surface of the ground was everywhere level and veins constantly pursued a straight line, there would be little difficulty in legislation to provide for all contingencies; but mineral is apt to be found in mountainous regions, where great irregularity of surface exists, and the course or strike of the veins is as irregular as the surface, so that many cases may arise in which statutory provisions will fail to secure to a discoverer of a vein such an amount thereof as equitably it would seem he ought to receive. We make these observations because we find in some of the opinions assertions by the writers that they have devised rules which will work out equitable solutions of all difficulties. Perhaps those rules may have all the virtues which are claimed for them, and if so it were well if Congress could be persuaded to enact them into statutes; but be that as it may, the question in the courts is not, What is equity? but What saith the statute? Thus, for instance, there is no inherent necessity that the end lines of a mining claim should be parallel, yet the statute has so specifically prescribed. (Sec. 2320.) It is not within the province of the courts to ignore such provision, and hold that a locator, failing to comply with its terms, has all the rights, extralateral and otherwise, which he would have been entitled to if he had complied, and so it has been adjudged. Iron Silver Mining Company v. Elgin Mining & S. Company, 118 U. S. 196 (30; 98.)"

Later, in the same case, at page 88, is the following:

"We pass, therefore, to an examination of the provisions of the statute. Premising that the discoverer of a vein makes the location, that he is entitled to make a location not exceeding 1,500 feet in length along the course of such vein and not

> exceeding '300 feet on each side of the middle of the vein at the surface,' that a location thus made discloses end and sides lines, that he is required to make the end lines parallel, that by such parallel end lines he places limits, not merely to the surface area, but limits beyond which below the surface he cannot go on the course of the vein, that it must be assumed that he will take all of the length of the vein that he can, we find from Sec. 2322 that he is entitled to 'all veins, lodes, and ledges throughout their entire depth, the top or apex of which lies inside of such surface lines extended downward vertically.'"

The "equitable solution" for the difficulty confronting the locator where his vein crosses the located side lines which has been suggested by the words "end lines become side lines" and which has been adopted by the courts and writers above referred to, is one which will be condemned by this Court unless it shall be found to be in conformity with the statute. That it is not, seems apparent.

In Iron Silver M. Co. v. Elgin M. & S. Co., 118 U. S. 196, it is said:

> "If the first locator will not or cannot make the explorations necessary to ascertain the true course of the vein, and draws his end lines ignorantly, he must bear the consequences. He can only assert a lateral right to so much of his vein as lies between vertical planes drawn through those lines. Junior locators will not be prejudiced thereby though subsequent explorations may show that he erred in his location."

The Court had under consideration the effect and operation of certain parallel lines intended by the locator

to operate as end lines, but which were not, and the question whether there were any other of the lines of a many-sided figure which could properly operate as such. There was no intimation of an extralateral right in any direction due to the irregularity of the location. But there is a recogniton of possible prejudice to junior locators where the extralateral rights are accorded to locations not conforming to the statute.

Estoppel.

Let it be conceded for the sake of argument that it is possible under the statute to compensate in a measure the locator who either could not or would not make the necessary explorations to determine the course of his vein upon the surface, and who finds himself in the unfortunate situation where his located side lines have become his end lines, and that it is proposed that such compensation take the form of a right of extralateral pursuit through the located end lines. We are at once confronted with a distinct estoppel. The locator who has so framed his notice of location, so placed and maintained his stakes, and especially the locator who has caused his land to be surveyed and monumented by officials of the Land Department, should not thereafter be permitted to claim to the injury of a junior locator that a mistake was made.

The trial court in this case held that no estoppel could arise. His error arises from overlooking the possible and probable effect in some instances upon tunnel locators under R. S., Section 2323. This section is a part

of the act providing for the disposition of mineral lands of the United States which, of course, must be made to harmonize in all its provisions. The rights of tunnel locators and the correlative rights of lode locators under R. S., Sec. 2322, are fully explained in Creed & C. C. M. & T. Co. v. Uinta T. & M. Co., 196 U. S. 337, and Calhoun M. Co. v. Ajax G. M. Co., 182 U. S. 499.

The locator of a tunnel acquires in the first instance no title to lands. He enters upon the mineral domain by invitation of its owner, and until by constant expenditure of money he has discovered along the line of his tunnel lodes or veins not previously known to exist he acquires nothing. He has but a mere hope or expectancy. It has been declared that by reason of the hazards and expense of his undertaking he should be fully protected. Notwithstanding, he is permitted to acquire no rights within the limits of locations already patented by the Government at the date when he makes his locations, even as to unknown or blind veins. Under these circumstances it is not to be doubted that the statute will not be so construed as to add to his hazards or defeat his just expectation.

A plain illustration will demonstrate the situation in which a tunnel locator might find himself were the *dictum* as to end and side lines to crystalize into law.

Referring to the plat of claims accompanying the opinion in Last Chance M. Co. v. Tyler M. Co., 157 U. S. 683, let us suppose that at the date of patent of the Last Chance claim the discovery vein had not been sufficiently explored to determine its true course. The shape of the location and the legal presumption arising, particularly

from and after patent, indicate a vein running easterly and westerly, with extralateral rights limited by planes drawn through the end lines of the claim. Let us further suppose that the lands lying westerly of the westerly end line of the Last Chance are unappropriated lands of the United States so situate that a tunnel may be run to explore them. Under these circumstances after location and perhaps after patent of the Last Chance a tunnel location is made 3000 feet more or less to the west of this lode claim, the face or portal of which is beyond the limits of the map, the direction of which tunnel is into the mountain and toward the Last Chance. Later by persistent and expensive work the tunnel locator discovers in the tunnel a vein coursing in a northerly and southerly direction and in accordance with his rights locates the Skookum Lode Claim shown on the map.

After this is done and after an ore body is developed within the boundaries of the Skookum location the owner of the Last Chance by exploratory workings demonstrates the fact that his discovery vein, instead of coursing with his claim as he supposed, crosses on its strike both his located side lines. Relying upon the supposed right to follow his vein extralaterally through the planes of his located end lines he drives an incline down beneath the Skookum and develops the fact that the ore body in possession of the tunnel locator is a part of the vein of which the Last Chance contains the apex and a controversy results.

If prior to the decision of the King-Amy case such a controversy had reached this court the *dictum* that the

end lines become side lines would not have found its way into its opinions. The statutory rights granted a locator will not be held to expand or diminish, dependent upon whether or not some junior locator holding under another section of the same statute has been disappointed or otherwise in his tunnel operations. Such a case as is outlined above may be now pending in the courts and may yet reach this court.

The Supreme Court of Colorado, in discussing the relative rights of a patentee whose vein departed upon the strike from his side line and the patentee of a lode location, evidently made from a tunnel, uses the following language:

> "This section clearly permits the patentee to follow the lode in its descending course to any depth, although in its downward trend it is carried by its dips, angles and variations into the adjoining land. Here is a departure from the common-law doctrine. The qualifying words, however, 'to any depth,' limit the direction in which the mine may be pursued beyond the side lines. The claimant is required to file in the land office a digram of his vein or lode. This is his own act. The law contemplates that before he prepares his diagram he shall so far expose and develop the lode as to be able to trace its course. The position that if the plat made by the surveyor does not cover the lode, the patentee should be permitted to so shift the lines of his patent as to include the lode which he before, through inadvertence or ignorance, failed to properly locate, is, it is conceived, without force. The error is not the mistake of a government officer, but the mistake of the claimant, and others ought not to be permitted to suffer by it. It is not the province of the surveyor to either discover or determine the

course of the vein. He acts under the directions of the claimant of the mine who has already furnished a diagram of his lode. His duties are to survey the located premises and make a plat thereof, indorsed with his approval, designating the number and description of the location, the value of the labor and improvements and the character of the vein exposed. (See Sec. 3.) However tortuous might be the course of the lode, the claimant had a perfect right to follow it up and prepare his diagram so as to include it, together with the surface ground on each side thereof allowed by local laws. There is no language in the act (of 1866) that requires the diagram to be in the form of a parallelogram, or in any other particular form. * * * The act appeals to the industry and enterprise of the miner to make sure that the lode is within his location. The higher his diligence in this respect the greater will be his reward. If by lack of assiduity and energy he makes an untrue location—a location not embracing the lode he seeks to secure—he cannot be heard to complain that others have explored and occupied the adjacent territory and discovered therein a lode which might have been embraced in his diagram. If, as the evidence tends to show, the Bell tunnel lode is but a continuation of the Ben Harding lode (after its departure from the vertical side line), extending through the adjacent location, upon what principle of justice or of law in the absence of an express statutory provision, can the patentee of the lode last named, claim the right to encroach upon the premises embraced by the Bell tunnel lode location and deprive the owner thereof of the fruits of his discovery?

"Before a claimant is entitled to a patent under the act of 1866, a compliance with its provisions is indispensable. It is necessary that a diagram of the lode claimed shall be filed in the local land office. Notice of the extent of the claim must be

given to the world by posting such diagram in a conspicuous place thereon, together with the declaration of the claimant's intention to apply for a patent. The register of the land office is required to give a like notice by publication in a newspaper and by posting in his office for a period of ninety days, which is in effect a summons to all persons whose interests may be affected by the issuance of a patent in conformity with the diagram to appear and file an adverse claim.

"If, after the expiration of ninety days, no one appears to contest, the surveyor-general, upon application of the claimant, is required to survey the location and make an approved plat thereof, and designate the number and description of the lode, the value of the labor and improvements, and the character of the vein exposed. For what purpose must these several acts be done? Do they not point with certainty to a segregation from the public domain of a described tract embracing a lode? If they have any significance, we are constrained to the conclusion that one of their leading objects is to require that the claimant shall, before applying for a patent, ascertain the exact location of his lode, and fix that location by his diagram so that the public may be apprised of the limits of the lode location, and may thereafter, with safety, explore and occupy adjacent tracts."

Wolfley et al. v. Lebanon Min. Co., 4 Colo. 112.

In like manner estoppel operates in favor of the Conkling and against the owner of the Constitution, Cumberland and Monroe Doctrine in the case at bar. For twenty-five years the owner of these claims held out to the United States and to those who might become purchasers from the United States that the end lines of these claims formed barriers beyond which he claimed no right

to follow any vein, either primary or secondary, which might apex within their boundaries. This was an invitation to the world to enter upon and explore the mineral lands lying to the southerly of these claims, to purchase the same from the Government and to exercise within such located and purchased premises all the common law rights of ownership unabridged by the assertion of extralateral rights of the three claims in question. It seems clear that every element of an estoppel is present.

Leather Mfrs. Nat. Bk. v. Morgan, 117 U. S. 96;

Kirk v. Hamilton, 102 U. S. 68.

The Circuit Court of Appeals of the Eighth Circuit, in the case of New Dunberberg Min. Co. v. Old, 79 Fed. 589, uses the following language:

> "The Act of 1872 required the applicant for a patent to locate his claim on the surface of the ground as a condition precedent to its issue, and it declared what rights he should acquire thereby, for the express purpose of defining, fixing, and limiting his claims and his rights. Under that Act, the location of a mining claim on the surface of the ground, and its entry for patent, is a notice to the Government and the public that the owner claims all the exclusive rights and privileges granted by the Act; but it is no less a notice, and a legal notice, that he renounces and abandons to the Government all other rights and privileges pertaining to his discovery of the lode for which he asks the patent. It would work manifest injustice to permit one who has located, and excluded all others from a claim of the full size allowed by the Acts of Congress, and from all veins whose apexes lay within its surface, to follow the lode upon the dis-

covery of which that claim was based at right angles to his location, and without its side lines, for a distance equal to the length of his claim."

Again, in Larned v. Jenkins, 113 Fed. 634, the same Court had occasion to say:

"Prior to the issue of the patent to the townsite the grantor of the plaintiff in error had located his claim to the Cook lode upon a tract of land 790 feet long and 50 feet wide, had marked the exterior boundaries of this claim, had entered it and received a patent for it. These acts constituted a notice to the Government and to the public that he was the owner of all the exclusive rights and privileges in this tract of land, and in the lode or vein therein, granted by the Act of July 26, 1866, under which he located and entered the land. But it was also a notice, and a legal notice, to the Government and to the public that he renounced and abandoned all other rights and privileges pertaining to the discovery of his lode which he did not secure by his patent."

Let us take another illustration having to do only with patented lode claims.

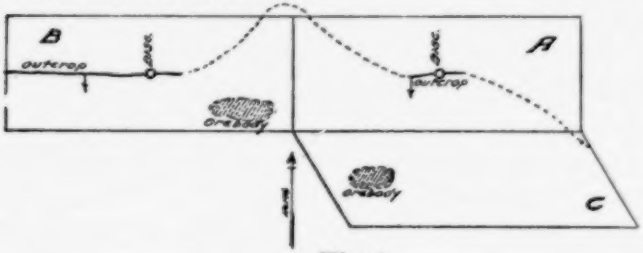

Fig 4.

In the foregoing diagram suppose the claims A, B and C to be patented, A being the senior location. The discovery points of A and B are upon the same vein on a visible outcrop indicated by the solid lines. These claims are owned by different parties and at the date of survey it was supposed the vein continued in a direct line from the westerly end line of B to the easterly end line of A. The owner of A does substantially no work upon his claim, but the owner of C develops an ore body at the point indicated within his own boundaries. Litigation follows in which C succeeds in demonstrating that instead of following the course supposed the apex of the discovery vein in A, by reason of surface irregularity, bears to the northwesterly and on its course crosses the northerly side line of A at a point easterly of the northwest corner of the claim, and bearing southeasterly from the discovery point crosses the southerly side line westerly of the southeast corner as indicated.

In this controversy the owner of A being denied extralateral rights through his southerly side line under the decisions of this Court, must fail even though it is admitted that the ore body in C is upon the dip of the discovery vein of A.

Meanwhile B at great expense has discovered and has mined and appropriated a large body of ore within his own boundaries at the point indicated. The period of the statute of limitations not having elapsed the owner of A brings suit for the value of the ore taken from the vein of which he has the apex crossing the parallel lo-

cated side lines which have been demonstrated to be his legal end lines.

Upon the theory of the respondent the owner of A must recover, notwithstanding his long continued assertions by location, by declarations in patent survey and application and by litigation that he claimed no right to follow his vein to the westerly of planes drawn through the located end lines. This reversal is plainly to the prejudice of the junior locator and was occasioned by the fact that the locator of A could not or would not "make the explorations necessary to ascertain the true course of the vein" within the precise meaning of the language quoted from the Iron Silver-Elgin case, 118 U. S. 196.

The foregoing illustrates a situation well within the bounds of probability and had it been presented to this Court for decision prior to the King-Amy & S. the *dictum* would not have found a place in the opinion.

In the next following subdivision of this brief is discussed the right of the locator to follow a vein upon the dip through located end lines where the apex of such vein is found more than three hundred feet distant from the discovery vein. It will there be seen that no such right can fairly be said to exist, and this fact indicates that the statement that "end lines become side lines" is at least too broad and requires certain qualifications.

While the general theory of the statute is to permit the discoverer of a vein so to locate the same as to have an extralateral right to so much thereof as he has properly included of the apex within his boundaries, it does not guarantee to him the right to follow extralaterally a

secondary vein which dips through the end planes. This arises from the holding in the Walrath-Champion case that there can be but one set of end lines for all the veins found within the claim. To permit the locator who maintains his boundary lines in certain relations to each other to shift his position so as to reverse that relation is to every effect as against a junior locator prejudiced thereby, tantamount to permitting the senior locator to abondon his original discovery vein and adopt one coursing substantially at right angles thereto.

It must be concluded therefore that end lines fixed and adopted must remain such, and that no extralateral pursuit through the same is allowed, certainly after patent granted.

Location Upon the Dip.

The petitioner in its Brief on Certiorari (p. 110) cites the opinion of the trial court to the effect that the locator of the Conkling presumably wished to obtain title to a vein apexing therein, and proceeds to agrue from the case of Calhoun G. M. Co. v. Ajax G. M. Co., 182 U. S. 499, that no location can validly be made upon the public domain unless upon the apex of the vein.

All the trial court had in mind was the bare presumption arising from the fact. It was not and could not have been intended to declare that a valid location may not be made upon the dip of a vein, under which location, by discovery of mineral and subsequent compliance with the Statute, a patent might issue. Still less did it intend to declare that a patentee may not under his common law right hold everything within his boundaries, including a

vein apexing in lands of another under such circumstances that it may not be followed extralaterally.

Nor did this Court in the Calhoun Ajax case or any other case intend to hold that it is necessary to discover the top or apex of the vein, and so place the lines of the claim as to include it. What the Court there had in mind was the proper location which would give to a locator the right to the vein to its fullest extent, that is, the right to follow the same extralaterally.

It could not have meant to hold that in such a case as that shown in Cosmopolitan Mining Company v. Foote, 101 Fed. 518, Mr. Foote's location of the Cosmopolitan would have been invalid if it had been made beneath the surface of the claim upon the dip of the vein apexing in the Badger claim, but which vein the Badger owner had no right to follow outside his boundaries.

There must be more instances where claims located upon the apex have their lines so drawn as to exclude a portion of the dip, or by reason of non-parallelism of end lines obtain no extralateral rights. Such a one was the Iron-Silver-Elgin case, 118 U. S. 196.

Mr. Lindley, at Secs. 337 and 364, discusses the question and his conclusions are in accord with our contention, and with the concensus of opinion at the bar.

2. *Even though it be held that under proper conditions the right of extralateral pursuit through located end lines may be granted, this is not a case which comes within the letter or the reason of the rule as foreshadowed by some of the decisions.*

No such state of facts is here shown as would war-

rant the Court in holding that the side lines are to be regarded as end lines, and the end lines as side lines.

(a) Because there is no testimony whatever showing either by clear and convincing proof, or at all, that the discovery vein had a course or strike in any direction other than along the side lines of the claim.

(b) Because there is nothing in the case tending to show that there was any mistake in the location of the claim, or any other intent than that of securing title to surface ground with extralateral rights, if veins should be discovered, through the located side lines.

(c) Because the incidental Crescent Fissure vein is more than 300 feet from the discovery.

(a)

The testimony falls far short of what is necessary to overcome the presumption arising from the lines as laid by the locator and fixed by the patents.

The Crescent fissure vein is an *incidental* vein. It is not the *original* vein upon which the discovery of either of petitioner's three claims was made. This is apparent from the situation of the discovery points of the claims each of them being placed exactly in the middle of the locations, and from the testimony of the witnesses. Hans Johnson states that he had charge of the work under Superintendent Blood of running the "Constitution east drift" from the Constitution Tunnel to the easterly termination of the drift and started the Constitution west drift as well, in October, 1911, just prior to the trial of the cause. (Rec. 110, 111.) George D. Blood (Rec. 112) states that he has been petitioner's superintendent since 1909, and testifies

that the Constitution east drift and Constitution west drift were run by him (Rec. 174), and Walter H. Wiley, engineer of petitioner, testifies that this work along the wash from the western side line of the Monroe Doctrine develops the Crescent Fissure at the line between the wash or debris and the solid formation, and that this was done between October, 1911, and January, 1912. (Rec. 128, 129.)

The discoveries of the three claims in question lie from 450 feet to 550 feet northerly of the apex of the Crescent Fissure, as placed in pink upon the petitioner's map, Exhibit "A," so that there can be no question that the veins or deposits upon which the three claims were located are separate and distinct from the Crescent Fissure, whose existence within the surface boundaries of the claims has but recently been demonstrated.

Without expressly so stating the petitioner seems to claim that since no other vein has been shown within the three claims the Crescent fissure must be held to be the *discovery* vein (Brief on Petition, p. 109), and seems further to state that the trial court so held. (ib. p. 112.)

The finding of the Circuit Court of Appeals was that the Crescent Fissure vein was not the discovery vein of the Monroe Doctrine, the Cumberland or the Constitution claims. (230 Fed. 563.) It necessarily follows that the Crescent Fissure is but an *incidental* vein.

The trial court made no finding whatever upon the subject nor did he express any opinion so far as can be ascertained from the decree or the opinion of the Court. (Rec. 3977, p. 262.)

His holding, had he made one, would doubtless have been in accordance with that of the appellate court, for it is incredible that a locator could have used as his discovery vein one which was not worked or developed within his claim for more than twenty years after his patent issued, or that any locator could make four mistakes of the same character, or in four instances place his discovery points some 450 or 500 feet from his vein. This is fortified by the fact that the petitioner in its answer to the complaint (Rec., p. 63,) utterly fails to identify the Crescent Fissure vein as the one upon which the discoveries of the four claims across which it courses were made or laid.

Under these circumstances the only finding upon the subject is that of the Circuit Court of Appeals. This court has held that in such a case "it is its duty to accept a finding of fact unless clearly and manifestly wrong."

Lawson v. United States Min. Co., 207 U. S. 1-12.

So we find the situation to be that the petitioner claims the existence of a discovery vein which crosses the located side lines of the claims. The intent is to invoke the doctrine of the Flagstaff case and the doctrine of the Del Monte case and obtain for the incidental vein the extralateral right through the located end line planes.

The argument, of course, is that the legal end lines of the claim, fixed by the discovery vein, are such for all secondary veins.

Walrath v. Champion Min. Co., 171 U. S. 518;

Cosmopolitan Mng. Co. v. Foote, 101 Fed. 618;

Jefferson Min. Co. v. Anchoria M. & M. Co., 32 Colo. 176;

St. Louis M. & M. Co. v. Montana M. Co., 104 Fed. 664.

Hence it was and will be claimed that since the legal end lines are the same, the legal side lines must be the same for all veins, and since, as insisted, the right of extralateral pursuit is given to the discovery vein through the legal side lines, it must be granted to the incidental vein through the same lines.

But first let us see what proof is requisite to overthrow the presumption that the discovery vein runs with the located side lines, and next whether the proofs meet the demands.

It can hardly be denied that there exists a presumption that the discovery veins ran lengthwise of the claims.

Work Min. & Mill Co. v. Dr. Jack Pot M. Co., 194 Fed. 629;

Enterprise M. Co. v. Rico Aspen M. Co., 167 U. S. 115;

Stewart M. Co. v. Ontario M. Co. (Ida.), 132 Pac. 787.

This presumption is based not only on the assumption that the locator will take as much of the strike of the vein as he may be able, but upon the fact that it is a part of the duty of the Land Department to determine the regularity of all steps taken in issuance of the patent, among others the existence of a vein, the width of the claim and the distribution of such width with reference to the vein. As

said by this Court in the Work-Dr. Jack Pot case, the establishment of the end lines by the patent is a part of the administrative action of the Land Department.

> "The Land Department is a quasi judicial tribunal upon the questions presented and a conveyance in execution of the judgment."
>
> U. S. v. Northern Pac. R. R. Co. (C. C. A.), 95 Fed. 864;
>
> James v. Germania Iron Co. (C. C. A.), 107 Fed. 597.
>
> "As the defendant seeks to question the correctness of the end lines as fixed by the patent, the burden is upon it to show that the end lines therein described are not the true end lines of the claim."
>
> Work M. & M. Co. v. Dr. Jack Pot M. Co., 194 Fed. 629.

The determination made by the Land Department is one which may not be lightly set aside, upon the mere allegation of mistake or in order to meet the supposed necessities of the defendant's case. The proof must be clear and convincing.

> "One who would attack a patent for a mistake of fact in the decision of the questions which condition its issue must distinctly plead and clearly prove the evidence before the Land Department from which the mistake resulted, the particular mistake that was made, the way in which it occurred, and the fact that if it had not been made the decision would have been otherwise and the patent would not have issued, before any court can enter upon the consideration of any issue of fact determined by the department."
>
> U. S. v. Northern Pac. Ry. Co. (C. C. A.), 95 Fed. 882.

> "The presumption attending the patent, even when directly assailed, that it was issued upon sufficient evidence that the law had been complied with by the officers of the Government charged with the alienation of public lands can only be overcome by clear and convincing proof."
>
> U. S. v. Iron Silver M. Co., 128 U. S. 673.

While we do not, nor does the petitioner, attack the validity of the patents to the three claims, petitioner seeks to attack the finding of the department, *founded upon the representation of the locator,* that the vein or lode had a given direction, which finding embodied in the terms of the grant, resulted in a specific grant of veins extending upon their dip beyond the side line planes as the claim was located. We see no reason why the evidence should not, as in case of direct attacks, be clear and convincing. It will be noted that in the case at bar there was no hint in the answer of petitioner that the claims in question were mistakenly "made or laid" upon the vein which, as alleged, crosses the located side lines. For aught that appears they were thus advisedly and purposely laid.

What is the evidence upon which this presumption is sought to be overcome, and does it rise to the measure of proof in any sense of the term?

The only testimony in the record is that of Mr. Wiley, (Rec. 147):

> "I have been on the surface at the point indicated as the discovery of the Brave Columbia, Constitution, Cumberland and Monroe Doctrine. The discoveries of the Brave Columbia, Constitu-

tion and Cumberland are pits in the wash, three feet deep. The discovery of the Monroe Doctrine is in wash four feet deep; that is, today they are caved, but from the appearance of the dumps I do not think they ever went much deeper, and what was in the bottom of them below the points you can see today, I don't know, except I think they were all entirely in wash. From observations of all the work accessible, not only here but elsewhere in the immediate vicinity, and especially from the fact that the Constitution tunnel working constituted what might be termed a cross-cut entirely across all four of those claims, and at no point in those workings was there any northerly or southerly vein to be seen, I am clearly of the opinion —I preferred to state it as an opinion with the basis; explaining the basis of the opinion. I might perhaps say I know, because I have been carefully through there, and I have not seen any vein running in a northerly direction, and there is no vein which is of any extent continuing in a direction at all parallel with the side lines of any one of those four claims."

And Geo. D. Blood (Rec. 151):

"I know where the so-called discovery point of the Brave Columbia, Constitution, Cumberland and Monroe Doctrine are upon the ground. I have visited and examined the ground there in the immediate vicinity. The bed rock does not crop out there. It is covered by wash; I don't know to what depth. I did not observe any workings which had gone down to bed rock anywhere in the vicinity of the claimed discovery point or reputed discovery point of either one of these claims. Under the discovery of the Brave Columbia the Apex tunnel runs. On the surface there is nowhere disclosed anywhere in that neighborhood the bed rock. The Apex tunnel discloses solid rock under the discovery of the

Brave Columbia. I find fissures in the Apex tunnel north of the point marked here as the Constitution drift, and east and west drifts. At a point marked "Shield's incline," from the Apex tunnel, there is a fissure going southerly from that point. It is rather *thin cracks* in the limestone and at nearly right angles to the bedding, and nearly at right angles to the sides of the claims. And then going southerly from that there are at least two other distinct *cracks,* and I saw a sample taken from one of those cracks by Mr. Johnson in the Crescent fissure. I would say about 25 feet south of the top of the Shield's incline, and there is the same *fissure* appearing some 25 feet from that point, southerly. They are all running in such a direction that they would cut the side lines of the Brave Columbia at about right angles approximately. Apart from these fissures that I have spoken of as found in the Apex tunnel and what we call the Crescent fissure disclosed in the east and west Constitution drifts. At a point about midway between the Crescent fissure and the fissuring just mentioned, there is another set of fissuring parallel with both of those mentioned. The *fissures* themselves seem to be very small, but several of them.

"At the Antelope tunnel, at a point marked as the cross-cut, the first cross-cut south from Station 3 on the Antelope tunnel, there is a cross-cut run on the fissure, which, if it continued, would cut the lines of the Brave Columbia, Constitution, Cumberland and Monroe Doctrine at practically right angles, and three other cross-cuts are shown upon the map down to Station 2744, or in that neighborhood. All of those fissures having a direction that would cut the side lines of those claims at approximately right angles. There is a cross-cut at Station 2742. The fissure is run on a small porphyry dike, the strike of the fissure being shown upon the map and the dip of it being approximately parallel to the Crescent fissure. With

that exception I did not recognize any porphyry, but quartz is to be seen in the other fissures.

"I don't remember about what surface exposures there are on the Cumberland except the small hole at the discovery of the Cumberland. I visited that in October in company with Mr. Wiley, and Mr. Brooks was with us at the time. The nature of the wash there is such that as soon as the timbers would rot, they would become obliterated; not only covered with wash, but covered with vegetation. I don't mean covered completely with vegetation, but vegetation grows all over the surface of those claims. There is a growth of balsam in this neighborhood, and there is also some underbrush."

The cross-examination of Mr. Wiley is not overlooked but omitted because it has reference to the Brave Columbia claim, which does not enter into our discussion since no extralateral rights from that claim can reach the territory in controversy. But this testimony, as well as the testimony of Mr. Blood, quoted in our brief, is inadequate to support a finding that there is not any vein coursing in the direction of the side line. At the risk of repetition we quote all there is on this subject, leaving out what was said about veins running across the location. Mr. Wiley says (p. 150):

"But at no point, I can safely say, have I seen any vein at any point there or anywhere have I seen any vein running in a northeasterly and southwesterly direction parallel to the side lines. I have not seen any evidence of any vein other than I have spoken of anywhere within the limit of either of these claims, except deeper down."

Mr. Blood, the only other witness who spoke upon the question of ore occurrences in these claims, is absolutely silent.

In order to test the value of Mr. Wiley's testimony excluding all veins except such as cross the side lines, let us see what opportunity he had for examination. He first went upon the ground in October, 1911. After that the Constitution East drift and Constitution West drift were run (Rec. 129). As stated by Mr. Brooks, the bed-rock is covered by heavy wash. Let us see, then, what opportunity Mr. Wiley had for forming an opinion as to the presence or absence of fissures coursing with the side lines in the Monroe Doctrine claim. We submit herewith a sketch of this claim, or rather a vertical section through its center line, taken from the petitioner's map Exhibit "A." Fig. 5 shows all the openings which exister upon or

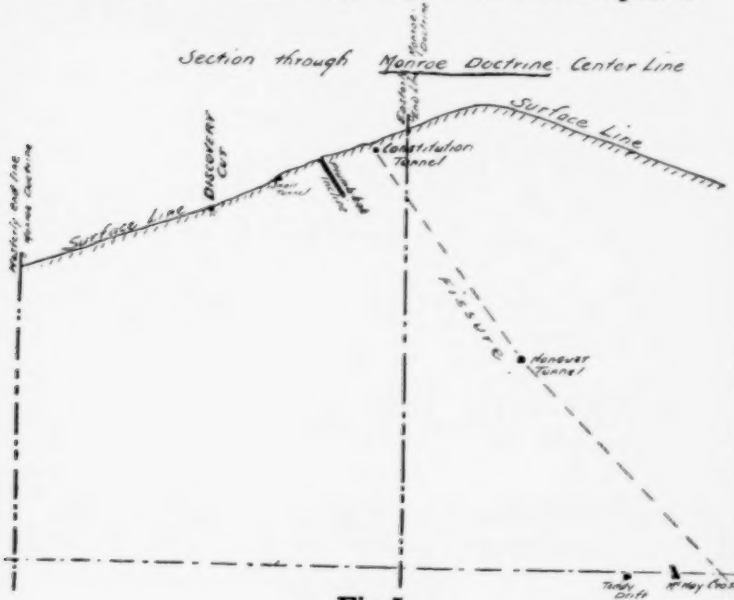

Fig 5.

beneath the surface. It is manifest that no part of the bedrock was ever examined by Wiley or Blood or any other witness, or could have been, excepting the Plum-Bod Incline which appears to be inaccessible and the line where the Constitution West drift went along at the lower edge of the wash. The place which should have been examined, the Discovery Shaft, was not examined.

So also Fig. 6, a vertical section taken from Exhibit "A" shows the opportunity afforded Mr. Wiley to speak in respect to longitudinal veins in the Cumberland claim. It will be seen that the Discovery Shaft was there, but was not examined. It will be observed that the recently constructed Constitution West drift runs along at the

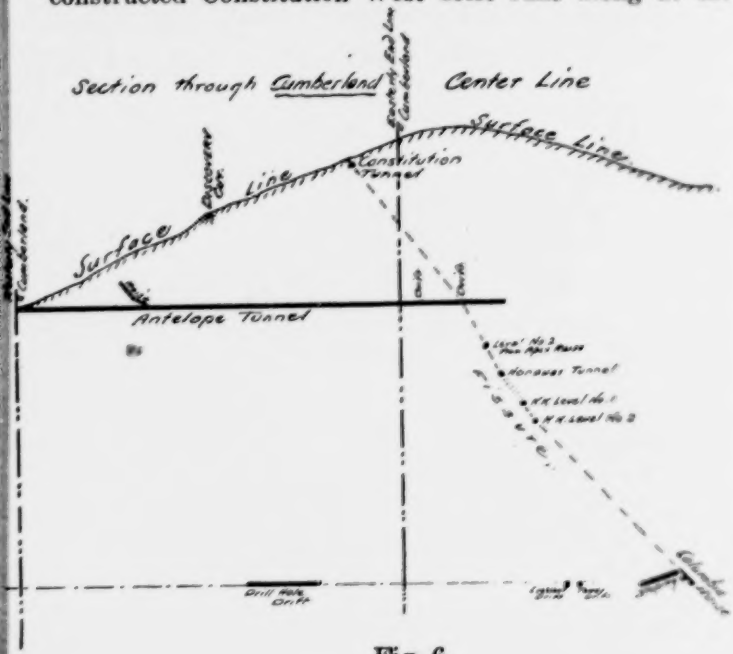

Fig. 6.

top of bedrock near the extreme end of the claim. The Antelope Tunnel runs lengthwise through the claim, but it is at a great depth below bedrock. Still deeper is the Alliance Tunnel Drill Hole Drift.

Fig. 7 is a similar sketch showing the workings upon and beneath the Constitution claim.

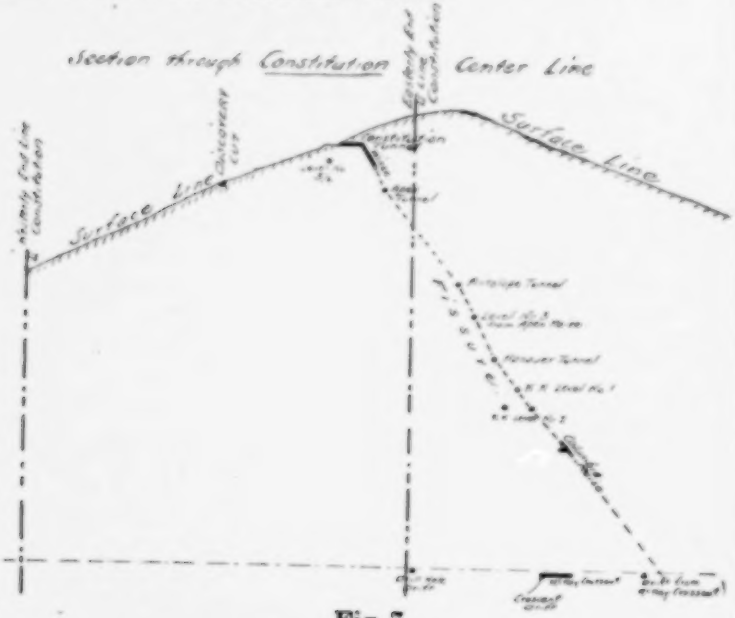

Fig. 7.

We submit that the foregoing demonstrates the insufficiency of the basis from which Mr. Wiley purported to testify, and it justifies us in saying that the Court could not have found as a matter of fact that there were no veins coursing with the side lines of the claim.

(b)

There is no suggestion in the evidence of any mistake upon the part of the locator in laying the lines of this claim, and for aught that appears his discovery was upon a lode or vein which ran with and not crosswise of his location.

In the testimony above quoted it will be observed that the discovery points were indicated by shafts. Whether these shafts were sunk to the bed rock and there exposed a vein or not, petitioner, upon whom rested the burden of showing the mistake if one existed, has failed to present any proof. Indeed, there is, as heretofore pointed out, no allegation in the answer of any mistake made.

In the case of Cosmopolitan M. Company v. Foote, 101 Fed. 518, Judge Hallet comments upon the significant fact that no claim was ever made by the locator prior to the time of trial that his location was made otherwise than as his lines indicated. So in this case there is no suggestion that the location was made other than on a vein or lode running lengthwise of the claim until the time of trial, more than 30 years after the patent had issued.

The rule to be followed in such cases as this is clearly stated by Judge Hawley, whose experience and learning in this class of litigation is worthy of great respect.

> "The defendants' contention seems to be that because, as they claim, they have subsequently discovered the apex of a lode running northerly and southerly at the easterly line of their surface lo-

cation, they have a right to follow that lode in its dip underneath the Cosmopolitan claim, without any regard to the direction or course of the lode located by Foote. But that right, in law, depends upon the fact whether what are marked on the ground as the side lines of the location are in fact the side lines; and to determine that question we must look exclusively to the location, and find out what the defendant Foote located, because, if he located upon a lode that he thought had a northerly and southerly course, and made his relocation accordingly, and the subsequent developments proved that the locator was mistaken in the course of the lode, he would be bound by his own mistake, and governed and controlled in his rights by the facts as they were shown to exist, instead of what he thought existed at the time the location was made. The testimony given by the locator is wholly insufficient to show that any lode, ledge or vein had been discovered by him, or the prior locators of the ground, having a northerly or southerly course at the point of location."

Cosmopolitan Min. Co. v. Foote, 101 Fed. 521.

Ever since the decision of Flagstaff S. Mng. Co. v. Tarbet, 98 U. S. 463, locators have been advised that in order to obtain the benefit of extralateral rights, they must lay their locations along and not across the vein. The locator of the three claims under consideration was aware of this requirement. The Court there said:

"We think the intent of both statutes is that mining locations on lodes or veins shall be made thereon lengthwise, in the general direction of such veins, or lodes on the surface of the earth where they are discoverable, and that end lines are to cross the lode and extend perpendicularly downwards, and to be continued in their own direction either way horizontally."

If the location in this case was made with any intent to follow the statute, a discovery must have been effected before or at the time of location, or at least before patent.

> "The preceding Section 2320 • • • allows a claim to be located to the extent of fifteen hundred feet along the vein or lode, but provides that no location shall be made until the discovery of the vein or lode within the limits of the claim located; which is in effect, a declaration that locations resting simply upon a conjectural or imaginary existence of a vein or lode within their limits shall not be permitted. A location can only rest upon actual discovery of the vein or lode."
>
> King v. Amy & Silversmith Con. Mng. Co., 152 U. S. 222.

Again, in the course of the same opinion, the Court says:

> "But as was said by this Court in Iron Silver Min. & S. Co., 118 U. S. 196-207, 'if the first locator will not or cannot make the explorations necessary to ascertain the true course of the vein, and draws his end lines ignorantly he must bear the consequences.' The Court cannot become a locator for the mining claimant and do for him what he alone should do for himself. • • • Mistakes in drawing the lines of a location can only be avoided, as said in the case cited, by postponing the marking of the boundaries until sufficient explorations are made to ascertain, as near as possible, the course and direction of the vein. 'Even then,' the Court added, 'with all the care possible, the end lines marked on the surface will often vary greatly from a right angle to the true course of the vein, but, whatever inconvenience or hardship may thus happen, it is better that the boundary planes should be definitely determined by the lines of surface lo-

> cation than that they should be subjected to perpetual readjustment, according to subterranean developments subsequently made by mine workers.'"

The Court, through Mr. Justice Brewer, later announced its conclusions in the Del Monte case in the following language:

> "Second, the end lines, as he marks them on the surface, with the single exception hereinafter noticed, place the limits beyond which he may not go in the appropriation of any vein or veins along their course or strike. * * * Fourth, the only exception to the rule that the end lines of the location as the locator places them establish the limits beyond which he may not go in the appropriation of a vein on its course or strike is where it is developed that in fact the location has been placed not along but across the course of the vein. In such case, etc., etc."

With the addition that the end lines of the original vein shall be the end lines of all the veins found within the surface boundaries, this declaration was affirmed in

> Walrath v. Champion Mng. Co., 171 U. S. 293.

And the Court in this case further said:

> "But rights on the strike and on the dip of the original vein and rights on the strike and on the dip of the other veins, we have decided, are determined by the end lines of the location."
>
> ibid, p. 311.

From the foregoing it is apparent that the location, strike and dip of the original vein are most important facts to be determined in this case, for it is by these that

the locators' rights of extralateral pursuit must be determined.

The double burden of proof rests upon the petitioner in this case. It is the burden of showing a right to invade the common law possession of the Conkling claim owner, and the burden of showing, as against the locator's own declarations and against the finding of the land department, that his original vein crossed the located side lines.

This burden was not sustained by showing that at the discovery points there were shafts which may or may not have penetrated to the bed rock. It was not met by showing that in one or two places beneath the surface of the ground there were "fissures" which ran so that they "would cut the side lines." These fissures, found only in the Cumberland claim, since it was only beneath this claim that underground work exists beneath the discovery of any of the three claims, are not claimed to show mineral upon which a valid discovery could have been made. It is not met by the testimony of Mr. Wiley that in his opinion no vein "of any extent" is found continuing in a direction parallel with the side lines.

The petitioner claims under a statutory right, and under the exception noted by Justice Brewer in the Del Monte case.

An absence of any evidence whatever in respect to the existence of the original vein, cannot be made to do duty for evidence that such a vein runs in a given direction.

It was not necessary that the original locator should find more than an inch of vein or vein matter in order to

make his location. As said by Justice Miller in Stevens v. Williams, Fed. Cas. No. 13413:

> "The thinness or thickness of the matter in particular places does not affect its being a vein or lode."
>
> "All cases seem to agree that neither the size nor the richness of the ore is an element of the definition (of vein or lode)."
>
> 1 Lindley on Mines, Sec. 294.

The only thing necessary for the locator of these three claims to do, and all that the presumptions attending the patents subsequently granted prove was done, was to find mineral and obtain "evidence of such a character that a person of ordinary prudence would be justified in the further expenditure of his labor and means."

Castle v. Womble, 19 L. D. 455.

It was for the locator to say whether he would locate upon a vein found by him having at the point where he discovered it a direction southeasterly and northwesterly. His judgment was that the veins which he did find and upon which he located, though exposed to no greater extent than in his discovery shafts were the veins which, with their extralateral rights, would lead to profit. So much the facts in evidence show. Nothing to rebut this was proven by petitioner unless we are to substitute conjecture and inference for facts. A vein cannot be shown in this manner.

Iron Silver Mining Company v. Reynolds, 124 U. S. 374;

Sullivan v. Iron Silver Mining Company, 143 U. S. 431.

Even if the testimony in the case at bar had shown beneath the discovery points of each of the three claims a vein running at right angles of the located side lines, it would not avail without proof of the identity of such vein with the "original discovery vein," which the decisions make the important thing. Not that in some instances such proof might not be of facts from which the principal fact might be inferred, but since it was within the power of the defendant by very slight effort to disclose the veins which presumably are at the bottom of the discovery shaft, the failure so to do must be taken as a confession that the facts which would have been disclosed would make against its theory.

The rule invoked is well settled.

Kirby v. Tallmage, 160 U. S. 379;

Choctaw & M. R. Co. v. Newton, 140 Fed. 225-238.

It will not serve for the petitioner to show that the locator was mistaken in supposing that a vein ran lengthwise of the location. It must be shown that he was mistaken in supposing that the discovery vein so ran. This follows from the fact that the intent of the statute was to prevent "locations resting simply upon a conjectural or imaginary existence of a vein," as declared by this court in the King-Amy & Silversmith case.

No case can be found where new end lines were drawn, excepting where it is clearly shown that *a mistake* was made by the locator, and no case can be found where the *original* vein has not been disclosed and identified. This must of necessity continue to be the course of the

decisions unless we are to adopt the theory that the end and side lines may float until it becomes necessary for the owner of the claim to decide or until the development work makes clear the direction of the vein.

The locator of these three claims, when he dug the discovery shafts at the discovery points and struck the seamed and shattered surface of the bed rock, either did or did not discover a vein or lode. If he did, it should not be difficult to show *the very vein* or lode or mineral seam located upon, and thereby determine whether the locator was or was not mistaken. If it be found to run with the located side lines as *presumably it does,* there is no possible ground for holding that the lines are other than laid by the locator. If it be found that the vein or lode or mineralized seam runs crosswise of the located side lines, it is a case where the locator himself, with the evidence before him, deliberately determined to violate the plain provisions of statute for the purpose of obtaining some advantage. It certainly needs no argument to show that under such circumstances the Court would not draw new lines, but would hold him to the results of his own acts.

If, on the other hand, it should be found by such excavation that no mineral vein whatsoever was exposed, and if thereby it be left in doubt as to the course or strike of the original vein, the presumption afforded by the patent must prevail, and the end lines remain as laid. This must certainly be the result if, as intimated by petitioner's witnesses, Wiley and Blood, the locator never penetrated to bed rock and obtained his patents without the discovery of mineral.

This is a case, therefore, where the facts are entirely lacking to rebut the presumption raised by the patent, and where there is no testimony to indicate that there was any mistake made by the locator.

(c)

Whatever may be the holding of this Court as to the right generally to follow a vein upon its dip through the located end lines, in the case at bar no such right exists, for the reason that the apex of the Crescent Fault Fissure is more than three hundred feet distant from the discovery point.

It is now certain that according to the position taken by the petitioner it is not claimed that the discovery vein is to be found running across the veins at the discovery point. As to whether it may not be found there running along the claims there is no testimony, for the petitioner avoided making an investigation of the discovery shafts. The position is clearly and definitely taken by petitioner that the Crescent Fissure, which outcrops as shown by the painted band on Exhibit "A," is the vein upon which the discovery was made. (Brief on Petition for Certiorari, pp. 109-110.) This is probably in recognition of the doctrine for which we contend that in order to turn end lines into side lines a mistake must be shown and to show a mistake the identity of the discovery vein must be fixed. But it is impossible to hold that the Crescent Fissure is the discovery vein for several reasons:

First, the declaration of the claimant himself is against it. The discovery point of a claim is an important feature. It is no meaningless term. It embraces that place within the boundary of the claim where the locator

has discovered the essential vein or lode. It is the point as recognized in Farrell v. Lockhart, 210 U. S. 142, at which the rights of the claimant are initiated. Its loss by patent to another involves the loss of the entire claim.

Gwilliam v. Donnellan, 115 U. S. 45;
Waskey v. Hammer, 223 U. S. 85.

It is beside the point to urge that a discovery may be made anywhere within the four corners of the claim. The question is not where it might have been placed but where it was placed. We have the indisputable evidence, by admission of the petitioner, that the discovery point, that is, the place where was disclosed the discovery vein of each claim, was at the point marked "discovery," many hundreds of feet from the then unknown and subsequently disclosed apex of the Crescent Fisure.

Secondly, it is imposible that the Crescent Fissure is the discovery vein because we know as a fact that within the limits of two of the claims at least there was no disclosure of the Crescent Fissure prior to October, 1911, about thirty years after the claims were patented. It is beyond all question that prior to the developments made for the purpose of this suit, in 1911, there was no opening in the Crescent Fissure within the limits of the Monroe Doctrine and Cumberland claims, and it was conceded there never was any outcrop on the surface.

Thirdly, to hold the Crescent Fissure as the discovery vein involves one of two consequences, to-wit, either that the applicant misrepresented the location and direction of the vein or that the officers of the Land Department disobeyed the law and regulations of that depart-

ment in permitting the issue of patent for claims improperly laid as to direction of lines and improperly laid as to width on either side of the discovery vein. The department would not have permitted a claim 1500 feet in width.

Jack Pot Lode, 34 L. D. 170;
The Belligerent, 35 L. D. 22.

It will be observed by reference to the map, Exhibit "A," that if a vein be supposed to run through the discovery points of the Constitution, Cumberland and Monroe Doctrine Claims (a supposition in all probability contrary to fact, but made necessary in order to give to petitioner any standing whatsoever in its contention), such vein, which we may call the "discovery vein," lies more than 400 feet distant from the apex of the Crescent Fault Fissure as it extends on its course through these claims. No apex rights can be founded upon a vein apexing thus more than 300 feet distant for the reason that to grant such rights would be to give to the locator a right of extralateral pursuit greater than he would have had had he followed the law in making his location instead of violating it as, by hypothesis, he did in this case. In other words, if the locator of these three claims had located the same upon his discovery vein in the manner contemplated by law, he would have made the discovery vein the center line of his location, and would have laid his side lines at a distance of either 25 feet or 100 feet or 300 feet on either side of this center line. In applying for patent, he would have been allowed to include no more within the lines of his location than we have indicated above. Such a claim

properly made and laid, and patented to the locator, would have excluded the apex of the Crescent Fissure Vein. To give at this time to the locator the right to pursue this vein extralaterally simply and solely upon the ground that he violated the statute, is a proposition which is refuted by the mere statement of it. We refer to Fig. 8, which is a diagram of the claims in question and the apex of the Crescent Fissure with the addition of a "discovery vein" and a hypothetical "third vein" introduced for purposes of argument. The dotted lines, a-b and c-d, represent the side lines of a claim located in accordance with the provisions of the Act permitting side lines to be drawn not less than 25 feet from the center of the lode. The dotted lines, e-f and g-h, represent the side lines of a claim laid also upon the discovery vein, with its side lines 100 feet from the center of the discovery vein. These lines are introduced for the reason that since the patents in this case show patented claims 200 feet in width, it may be presumed that there was authority under the local By-Laws of the mining district for locations of that width. The dotted lines, i-j and k-l, represent side lines of a claim made and laid upon the discovery vein with its side lines, 300 feet distant from the center of the supposed discovery vein, this latter distance being the utmost limit to which the Land Department would have the authority to include surface ground on either side of the lode or vein.

Upon the trial of this cause it was urged in behalf of respondent that although it might be urged upon authority that a claim laid across the strike of the vein manifestly in disregard of the statute, but laid *by mistake* and

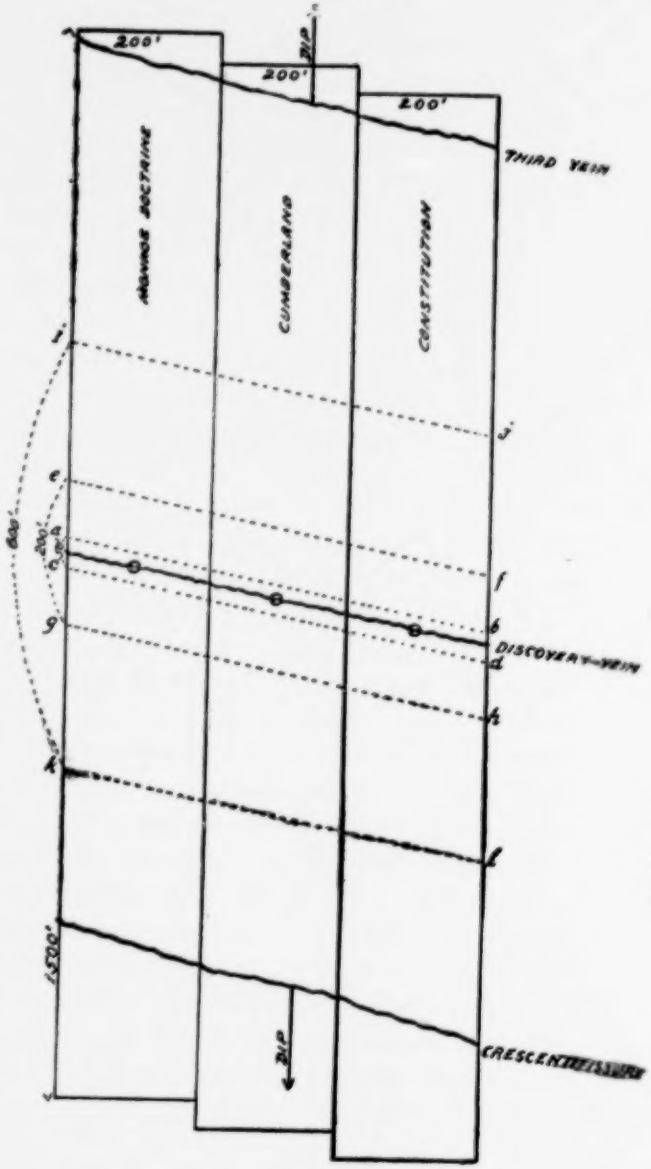
200'
DIP
200'
200'
THIRD VEIN
ADVANCE DOCTRINE
CUMBERLAND
CONSTITUTION
i
j
e
f
200'
a
b
DISCOVERY VEIN
d
g
h
k
l
1500'
DIP
CRESCENT

Fig. 8.

not with a wilful intent to violate the statutory provisions, should be held void as to the excess over and above lines drawn 300 feet distant from and parallel to the discovery vein, it was not necessary in this particular case to hold that the Constitution, Cumberland and Monroe Doctrine patents were void as to such excess. Indeed, respondent contended that there was no sufficient evidence of the existence of a discovery vein through the discovery points of these claims and that for that reason there was no sufficient evidence upon which the Court could find a void excess in the patents as granted; but that giving to the petitioner the utmost benefit of its argument in behalf of the theory that the side lines have become the end lines, and the end lines the side lines, it must be necessary to draw new judicial side lines at a distance of 100 feet or 300 feet from the center line of the discovery vein. This should be done by analogy to the judicial end planes which are drawn by the Court parallel to the located end planes in cases where the apex of a vein passes through the side lines.

The statute, R. S., Sec. 2322, provides that locators of all mining locations made on any mineral vein, lode or ledge, so long as they comply with the laws of the United States and with the state, territorial and local regulations not in conflict therewith governing the possessory title, shall have the right of possession and enjoyment of all the surface included within the lines of their location. They are further given a right to all veins, lodes or ledges throughout their entire depth, the top or apex of which lie inside of such surface lines extended downward, al-

though such veins, lodes or ledges may depart from a perpendicular, but their right of possession to such outside parts shall be confined to the portions thereof lying between vertical planes drawn downward through the end lines of their locations and continued in their own direction.

Section 2320 declares that no claim shall extend more than 300 feet on each side of the middle of the vein at the surface, and provides that the end lines of each claim shall be parallel to each other.

Section 2325 provides the method of obtaining a United States patent for a claim properly located.

It is clear that a patent of mining ground conveys (subject to the exceptions in favor of the owner of a vein having its top or apex within another location) the mineral beneath its surface. Subject to a performance of the conditions upon which such rights exist there is further granted the right to follow any and all veins having their tops or apexes within the patented area outside of the side line plane of the location. It is familiar doctrine that one of these conditions is that the end lines of the claim shall be parallel, or at least that they shall not diverge in the direction of the dip.

In 1893 this Court, by Mr. Justice Field, made use of the following language:

> "The section also declares that no claim shall extend more than 300 feet on each side of the middle of the vein at the surface; nor shall any claim be limited by any mining regulation to less than 25 feet on each side of the middle of the vein at its surface, except as prevented by adverse rights existing on the 10th day of May, 1872, and that

the end lines of each claim shall be parallel to each other. A claim located in conformity with the provisions of this section would take the form of a parallelogram, if the course of strike of the vein should run in a straight line; but such veins and lodes are often found upon exploration to run in a course deviating at different places from such line. And from this circumstance much difficulty often arises in determining the lateral rights of the locators. * * * *Side lines, properly drawn, would run on each side of the course of the vein or lode distant not more than 300 feet from the middle of such vein.* * * * The Court cannot become a locator for the mining claimant and do for him what he alone should do for himself. The most that the Court can do, where the lines are drawn inaccurately and irregularly, is to give to the miner such rights as his imperfect location warrants. Under the statute it cannot relocate his claim and make new side lines or end lines. Where it finds, as in this case, that what are called side lines are, in fact, end lines, the Court, in determining his lateral rights, will treat such side lines as end lines and such end lines as side lines; but the Court cannot make a new location for him and thereby enlarge his rights. He must stand upon his own location, and can take only what it will give him under the law."

King v. Amy & Silversmith Cons. Mng. Co., 152 U. S. 222.

In 1897 the Court, by Mr. Justice Brewer, used the following language:

"It needs no argument to show that if this were the only section bearing upon the question, patents for land containing mineral would, except in cases affected by local customs and rules of miners, be subject to the ordinary rules of the common law, and would convey title to only such minerals as were found beneath the surface. We,

therefore, turn to the following sections to see what extralateral rights are given and upon what conditions they may be exercised. And it must be borne in mind in considering the questions presented that we are dealing simply with statutory rights. There is no showing of any local customs or rules affecting the rights defined in and prescribed by the statute, and beyond the terms of the statute courts may not go. They have no power of legislation. They cannot assume the existence of any natural equity and rule that by reason of such equity a party may follow a vein into the territory of his neighbor, and appropriate it to his own use. If cases arise for which Congress has made no provision, the court cannot supply the defect. Congress having prescribed the conditions upon which extralateral rights may be acquired, a party must bring himself within those conditions, or else be content with simply the mineral beneath the surface of his territory. It is undoubtedly true that the primary thought of the statute is the disposal of the mines and minerals, and in the interpretation of the statute this primary purpose must be recognized and given effect. Hence, whenever a party has acquired the title to ground within whose surface area is the apex of a vein with a few or many feet along its course or strike, a right to follow that vein on its dip for the same length ought to be awarded to him if it can be done, and only if it can be done, under any fair and natural construction of the language of the statute. If the surface of the ground was everywhere level and veins constantly pursued a straight line, there would be little difficulty in legislation to provide for all contingencies; but mineral is apt to be found in mountainous regions, where great irregularity of surface exists, and the course or strike of the veins is as irregular as the surface, so that many cases may arise in which statutory provisions will fail to secure to a discoverer of a vein

such an amount thereof as equitably it would seem he ought to receive. We make these observations because we find in some of the opinions assertions by the writers that they have devised rules which will work out equitable solutions of all difficulties. Perhaps those rules may have all the virtues which are claimed for them, and if so, it were well if Congress could be persuaded to enact them into statute; but be that as it may, the question in the courts is not, What is equity? but, What saith the statute? Thus, for instance, there is no inherent necessity that the end lines of a mining claim should be parallel, yet the statute has so specifically prescribed. (Sec. 2320.) It is not within the province of the courts to ignore such provisions, and hold that a locator, failing to comply with its terms has all the rights, extralateral and otherwise, which he would have been entitled to if he had complied, and so it has been adjudged. Iron Silver Mining Company v. Elgin Mining & S. Co., 118 U. S. 196."

Del Monte M. & M. Co. v. Last Chance M. & M. Co., 171 U. S. 55.

It is apparent from the foregoing that the proper location of the claim, that is to say, the fulfillment of the requirements of the Statute as to the amount of surface to be included on either side of the vein and the direction of the lines are important and condition the existence of extralateral rights. No reason can be conjectured why it is not as essential to draw the side lines of the location at a distance not exceeding 300 feet on each side of the center of the lode as it is to draw the end lines parallel. A violation of the latter requirement destroys or at least limits the right of extralateral pursuit, and there is no reason why a violation of the former should not have the

same effect as to all the surface in excess of what would be within a proper location.

It is well established that a United States patent issued without authority of law as well as one issued in spite of a law prohibiting its issuance, is invalid. Costigan on Mining Law, 393. There are numerous authorities sustaining this proposition, several of which are precisely in point in this case.

Mr. Lindley (2 Lindley on Mines, Sec. 362), is very clear upon this point:

> "Where the locator mistakes the course of his vein and locates across instead of along it, an excess of lateral side-line surface results and should be cast off. His surface rights resting on location would properly be defined by lines drawn three hundred feet on each side of the center of the vein as it actually ran."

Lakin v. Dolly, 53 Fed. 333.

This was an action at law by plaintiff against the defendant submitted upon an agreed statement of facts. So far as material here, it was shown that a patent had issued to the Mammoth Gold Mining Company for a parcel of land under two separate locations. The lode as marked in the patent as well as located and fixed on the surface, was in a straight line along the northwest boundary of the patented tract and within 50 feet of said line. All of the surface tract covered by the patent, except said 50 feet, was on the east or southeast side of the lode and extended about three-quarters of a mile therefrom. The by-laws adopted by the miners of the mining district, governing the location of claims therein made no provision

for the location of surface ground in excess of 100 feet on each side of the lode. The claim was surveyed and patented in the form above described and the action of ejectment was for land situate on the east or southeast side of the lode and more than 200 feet from the lode line thereof. The contention of the defendant was that under the provisions of Sections 2318 and 2320 of the Revised Statutes, the patent issued was void as to all that portion of the surface ground on the east or southeast side of the lode in excess of 300 feet from the center thereof. The contention of the plaintiff was that the Land Department had jurisdiction to pass upon all questions of fact and to issue the patent and that its action could not be collaterally attacked in an action of ejectment. The cause was tried before Judge Hawley, who, after citing and discussing the authorities and quoting Section 2320, proceeded as follows:

> "This entire section seems to be clear, definite and certain. It provides that all mining claims upon quartz lodes located prior to its passage should be governed as to the length of the claim along the lode 'by the customs, regulations, and laws in force at the date of their location'; that the claims located after May 10, 1872, 'may equal, but shall not exceed, one thousand five hundred feet in length along the vein or lode.' So far the section relates solely to the question of the length of the lode that may be located. It next takes up the question as to how much surface ground will be allowed to the locator of a quartz lode, and says that 'no claim'—evidently meaning all claims, whether coming within the first clause, relating to claims located prior to the passage of this section, or within the second clause, relating

to location made subsequent thereto—'shall extend more than three hundred feet on each side of the middle of the vein at the surface.' Having thus expressed the extent of the surface ground to which the locator may be entitled, it further provides that the amount of the surface ground shall not in any case be limited by any mining regulations to less than 25 feet on each side of the middle of the vein at the surface, except in certain contingencies, which have no application to the facts of this case. After the passage of the act of which this section forms a part, it seems very clear, to my mind, that the land department had no jurisdiction, power, or authority to issue a patent for a quartz lode to any surface ground exceeding 300 feet in width on each side of the middle of the vein or lode, and that any patent which is issued for more than that amount of surface ground is absolutely null and void as to the excess over 300 feet, and can be collaterally attacked in a court of law."

Another case, Lakin v. Roberts, was tried upon the same stipulation of facts and the same judgment was rendered. This latter case was taken by writ of error to the Circuit Court of Appeals of the Ninth Circuit, and there affirmed.

Lakin v. Roberts, 54 Fed. 461.

The Court there uses the following language:

"The language of the section of the Revised Statutes must be confined to preserving the application, and of all rights except the size of the claim, —length and width of it. All the provisions of the statutes would not otherwise be given effect. The land department, therefore, had no power to issue a patent for a greater width of land than 300 feet, and the patent in this case in excess of 300 feet is void. Doolan v. Carr, 125 U. S. 624, 8 Sup. Ct. Rep. 1228, and the other decisions cited in the opin-

ion of the learned judge who tried the case in the Circuit Court."

The Supreme Court of the United States enforced the same rule in

Richmond Mining Company v. Rose, 114 U. S. 576.

In this case it appears that the claim covered 800 lineal feet of the lode when (there being only three locators) both by the Act of Congress and the local laws of the mining district, only 200 feet could be appropriated to each locator. It was contended that this excess of 200 feet over the 600 feet which these three could locate, rendered the whole claim void. The Court held that if the excess 200 feet had been held by mistake there was no reason why this could not be rejected and the claim held good for the remainder since it interefered with no rights previously acquired. The Court says:

"We hardly think it needs discussion to decide that the inclusion of a larger number of lineal feet than two hundred renders a location, otherwise valid, totally void. This may occur, and often must occur, by accident of the surveyor, or other innocent mistake, where there exists no intention to claim more than the two hundred feet. Must the whole claim be made void by this mistake, which may injure no one, and was without design to violate the law?

"We can see no reason, in justice or in the nature of the transaction, why the excess may not be rejected, and the claim be held good for the remainder, unless it interferes with rights previously acquired. It appears by the facts found that one hundred and forty feet of the east end of plaintiff's location is lost to them by the superior

right of the Tip-Top claim, leaving only sixty feet of excess; and this, if it were necessary, might be excluded by the government at the other or western end of the claim when it comes to issue the patent; which would leave plaintiffs only the six hundred feet in one body, in regular form. This also would interfere with no prior rights, and would give plaintiffs the benefit of their claim to the extent of two hundred feet for each locator."

Richmond Mining Co. v. Rose, 114 U. S. 576.

Doolan v. Carr, 125 U. S. 618, was a case in which the question was whether a patent of the United States could be held void for want of power in the officers to issue it where the facts showed such want of power. The Court says:

"There is no question as to the principle that where the officers of the government have issued a patent in due form of law, which, on its face, is sufficient to convey the title to the land described in it, such patent is to be treated as valid in actions at law, as distinguished from suits in equity, subject, however, at all times to the inquiry whether such officers had the lawful authority to make a conveyance of the title. But, if those officers acted without authority; if the land which they purported to convey had never been within their control, or had been withdrawn from that control at the time they undertook to exercise such authority, then their act was void—void for want of power in them to act on the subject matter of the patent, not merely voidable; in which latter case, if the circumstances justified such a decree, a direct proceeding, with proper averments and evidence, would be required to establish that it was voidable, and should therefore be avoided. The distinction is a manifest one, although the circumstances that

enter into it are not always easily defined. It is, nevertheless, a clear distinction, established by law, and it has been often asserted in this court, that even a patent from the Government of the United States, issued with all the forms of law, may be shown to be void by extrinsic evidence, if it be such evidence, as by its nature is capable of showing a want of authority for its issue."

The Ninth Circuit Court of Appeals had occasion to consider the holding of that Court in Lakin v. Roberts, in Peabody Gold Mng. Co. v. Gold Hill Mng. Co., 111 Fed. 817, and uses the following language:

"The appellant relies upon the decision of this Court in Lakin v. Roberts, 4 C. C. A. 438, 54 Fed. 461, and particularly upon the language of the opinion where it was said:

'The land department, therefore, had no power to issue a patent for a greater width of land than 300 feet, and the patent in this case in excess of 300 feet is void.'

"The judgment in that case was rendered upon an agreed statement of facts, in which it was made to appear that the land in controversy, which was occupied as a townsite, was included within the area of the patented mining claim, but that there had never been any actual possession of that portion of the surface ground by the mining company, and that the right of the miners in that locality to a mining claim was not determined by rule or custom, but depended upon actual occupation of the surface. Under this admission of the facts the land in controversy in that case was held to be excluded from the operation of the patent. The admitted facts effectually rebutted the presumption which otherwise would have attended the patent, the presumption that the locator was lawfully entitled to all the premises described in his

grant, and that all the previous requisites of the law had been complied with."

In Jones v. Wild Goose M. & T. Co., 177 Fed. 95, the Circuit Court of Appeals of the Ninth Circuit again had occasion to consider the question as to the standing of a location having an excess area. The conflict was between placer locations, no patent having issued. The first locator had staked the ground under his location so as to include more than twenty acres. The second locator having discovered the fact that such excess area was included, located what he regarded as the excess portion. Afterwards the original locator made an amended location of his claim, casting off the excess, but including in his amended location notice the parcel which had been located by the second locator. In the action of ejectment brought by the first locator, the Court under these facts entered judgment for the plaintiff upon the ground that it was a mere mistake and that the first locator had the right upon discovering the same to amend his notice and include such portion of the original claim as he saw fit.

Judge Gilbert dissented upon the ground that the excess area was open to immediate location by another. The difference between the majority and minority of the court is not upon the law, but its application to the particular facts. Judge Gilbert, in his opinion, uses the following language:

"In the absence of fraud or bad faith, a mining claim which includes more ground than the law allows, is not entirely void, but is void only as to the excess. Such is the language of numerous de-

cisions and of the text-writers. The question arises: What portion of the excessive claim shall be deemed to be the excess? In the case of a lode claim located under regulations or a statute limiting the side lines to a certain width on each side of the vein or the discovery shaft, if the claim as marked is of greater than the permitted width, it is easy to ascertain where and what is the excess, and it would seem that the excess is open to immediate location by another. Taylor v. Parenteau, 23 Colo. 368, 48 Pac. 505; Lakin v. Dolly (C. C.), 53 Fed. 333; Bonner v. Meikle (D. C.), 82 Fed. 697-705. In Hausworth v. Butcher, 4 Mont. 299, 1 Pac. 714, the Court said:

'The boundaries must be so definite and certain as that they can be readily traced, and they must be within the limits authorized by law; otherwise their purpose and object would be defeated. The area bounded by a location must be within the limits of the grant. No one would be required to look outside of such limits for the boundaries of a location. Boundaries beyond the maximum extent of a location would not impart notice and would be equivalent to no boundaries at all.'"

From the foregoing it clearly appears that if the Land Department had issued a patent to the locator of the Constitution, Cumberland and Monroe Doctrine claims upon a state of facts apparent from the patent or plat, or from extrinsic evidence showing that the discovery vein lay as indicated in Fig. 8, the patents would never have been granted, as to all surface area in excess of that included within the figure e-f-g-h, or certainly all in excess of that included within the figure i-j-k-l. This being so, it follows necessarily that any extralateral rights claimed by the pettioner as the owner of the three claims

must be denied for the reason that such assertion is necessarily founded upon a clear violation of the terms of the law under which such extralateral rights are granted, not as an equity in favor of the locator nor as a common law right, but solely upon terms of strict compliance with the statute.

The learned trial court in his opinion (Rec. 262) uses the following language:

> "The United States has seen fit to grant the patents. The area embraced in any patent did not exceed the jurisdiction to grant conferred by statute. If there was a mistake or misrepresentation the patent was not void and cannot be collaterally attacked."

This, however, does not meet the point. It is not necessary to hold that the patents for these three claims were void. It was within the jurisdicton of the Land Department to grant them if the original vein ran with the side lines and the area was not excessive. The question is not whether the patent to the surface is void or can be collaterally attacked, but whether there exists the added right to extralateral pursuit *in favor of the Crescent Fissure.*

The position taken by the respondent in respect to the extralateral rights of the Crescent vein involves in effect the drawing of new side lines with reference to the supposed discovery vein shown on Fig. 5, or rather the determination of the rights of the holder of the patent with reference to new side lines which would, of necessity, have been drawn had the Land Department issued its patent in accordance with the facts now claimed to exist

by the petitioner. This is strictly analogous to the drawing of new judicial end line planes in cases where the apex of the discovery vein stops short of the end line planes of a claim as located, or where such vein departs from the side line. We cannot do better than refer to the discussion of this subject in Costigan on Mining Law, pages 424 to 444, and particularly Figures 19 and 34, inclusive.

The right of the petitioner to follow the Crescent Fissure upon its dip through the located end lines if upheld will clearly grant to it rights very greatly in excess of those contemplated by the Act of Congress. In Fig. 8, we have represented a "third vein" at the opposite ends of the three claims, which vein we have supposed to have a dip opposite to that of the Crescent Fissure. It must logically follow, if the holding of the trial court were to be sustained, that such an incidental vein dipping as we have indicated would have corresponding extralateral rights to that claimed for the Crescent Fissure; and if it shall be found (and from the geology of the district there is no improbability that such a vein exists) that other ore bodies are included within it at any distance from its apex, these ore bodies, as well, must belong to petitioner. The result would be that the defendant may lawfully possess under the same patent or patents ore bodies belonging to incidental veins having their apexes parallel and 1200 feet apart, a condition of affairs never contemplated by the law. This state of affairs would, under such a holding, become possible only where the locator had

clearly departed from the rules laid down by the statute.

To recapitulate, the argument is as follows:

1. The side lines become the end lines only when a mistake has been made by the locator.

2. The presumption is that the vein lies lengthwise of the side lines and the burden of proof is upon the owner to show a different state of facts.

3. No mistake can be shown without the clear identification of the discovery vein. A conjectural discovery vein would not be sufficient.

4. No facts have been shown in this case in any manner identifying the discovery vein or veins in the three claims.

5. Even if such state of facts were shown that the side lines had become the end lines of the claims, the right of extralateral pursuit upon the discovery or any vein through the planes of the located end lines does not exist.

6. Conceding that in some cases there exists a right of extralateral pursuit on *the discovery vein* through the plane of the located end line this right does not exist in the case at bar.

7. The statute prohibits the location or patenting of a claim, the surface area of which shall extend in this district more than 100 feet on either side of the discovery vein and in any case more than 300 feet on either side of any discovery vein; that is to say, the side lines must be drawn so as to include not exceeding 300 feet on either side of the discovery vein.

8. The Land Department has no jurisdiction to patent a claim whose surface is in excess of 300 feet on either

side of the middle of the discovery vein, and if in the case of these three claims the vein being shown as in Fig. 8, a patent had been granted having the exterior boundaries of either one of the three claims, such patent as to the excess area would be void at law.

9. The apex of the Crescent Fissure lies at all points more than 300 feet from the middle of the supposed discovery vein.

10. To grant to the Crescent Fissure under these circumstances extralateral rights through the located end line planes, would be to give to the locator rights in excess of what he would have enjoyed had he complied with the law.

11. The right of extralateral pursuit through the located end lines must, as to all incidental veins included within the three claims, be confined to such incidental veins as have their apexes within at most 300 feet of the center of the supposed discovery vein shown on Fig. 1.

12. The Crescent Fissure, not being such a vein, has no extralateral rights, and the Elephant Stope is the property of the owners of the Conkling Claim.

IV.

No reason appears for disturbing the judgment as to the value of the ores taken, it having been concurred in by the trial court and the Circuit Court of Appeals. (Record No. 5188.)

The judgment of the lower court fixing the amount of the recovery by the respondent against the petitioner was affirmed by the Circuit Court of Appeals, excepting only that upon the cross-appeal of respondent, wherein

complaint was made as to the amount of the recovery, the same was increased by the sum of $27,853.92.

The evidence taken upon the accounting is most voluminous and includes a very great number of maps and sections. It is discussed at great length in the opinion of the Circuit Court of Appeals. (255 Fed. 740-753.)

The basis of the decree is stated in the opinion of the trial court (Rec. 5188, p. 52,) which is, by stipulation, made a part of the record. (ib. p. 62.)

As indicating the difficulty of ariving at a proper accounting attention is called to the amended answer of petioner to respondent's complaint in which it is alleged (Rec. 5188) that the value of all the ore extracted from the Conkling claim up to December, 1911, was $20,047.50, and that such extraction was at a cost exceeding $72,500.00.

March 31, 1917, an account was filed before the trial (Rec. 115), on May 14, 1917, a second account (Rec. 123), on July 20, 1917, after the evidence was taken, a third account (Rec. 441), on September 17, 1917, a fourth account (Rec. 472), and in the brief accompanying the petition to this Court (Addenda), a fifth account.

In view of the state of the record the trial court found that the best that could be hoped for was an approximation of a true account between the parties, and such in effect is the finding of the Court of Appeals, which affirms the judgment.

The circumstances call for the application of the rule so often announced by this Court.

Stuart v. Hayden, 169 U. S. 1;

Dravo v. Fabel, 132 U. S. 487;

Illinois v. Illinois Central R. Co., 184 U. S. 77;

U. S. v. Stinson, 197 U. S. 200;

Lawson v. U. S. Min. Co., 207 U. S. 1;

Butte & S. Copper Co. v. Clark-Montana R. Co., 249 U. S. 12-30.

Equitable Considerations.

On page 59 of petitioner's "Additional Argument on Question of Boundaries," filed after the major portion of this brief was in type, is found the following:

> "There are no equitable considerations calculated to move the Court to favor the contention of the Conkling Company. Ever since that claim was surveyed for patent, fully thirty years ago, it has lain idle and nearly a quarter of a century has elapsed from the time it was surveyed for patent, until the first trial was had, during all of which time it remained idle, etc. • • • It was not until the petitioner, the Silver King Coalition Mines Company, had by its enterprise discovered ore on the line dividing Custer No. 2 Mining Claim from the Conkling Claim, that the owners of the Conkling Company had their cupidity awakened. When this discovery was made by the Silver King, the then owners of the Conkling, banking on the fact, etc., made any claim that the patent, etc., etc."

It is believed that the foregoing has no place in an argument upon the questions presented by this record. If we are mistaken, and if "equitable considerations" of

the sort alluded to are to be regarded we desire to call attention to the facts.

The Conkling claim was patented to the Boss Mining Company. We find that at a later date Nicholas Treweek and J. Leonard Burch became the owners of an undivided three-fourths and the Kearns-Keith Mining Company, the owner of an undivided one-fourth of the claim. After Treweek had held his title many years (Rec. 3977, 188,) these interests passed to the parties to this action within a year from the commencement of this suit. There is no suggestion that either of the parties acquired them otherwise than for a valuable consideration. They and their predecessors had for years held and paid taxes upon the ground without the slightest intimation so far as the record shows that the ownership was otherwise than of a full claim 1500 feet by 600 feet, containing 20.45 acres. As a practical matter it is not to be presumed that any purchaser would go behind the terms of the patent. Mr. M. J. Daily, the assistant manager of the Kearns-Keith and of the Silver King Companies, and who had been such for years before the ore was discovered, apparently knew nothing of the boundary question until about the time the ore was struck. (Rec. 5188, 203.)

This ore lay many hundreds of feet below the surface of the ground, accessible only by means of expensive workings either from the surface or from the surface of adjoining claims. Mr. Treweek knew that the Alliance tunnel was being run by his co-owners in the general direction of the joint property. He, himself, had started it and had run it 4882 feet. (Rec. 3977, p. 175.) He was cer-

tainly not called upon to duplicate this work in order to keep watch upon his co-owner. He had already spent a fortune in running another tunnel, the Hanauer, higher up in the same direction.

It is true that the Silver King, taking up the work where Treweek was compelled to abandon it after more than $100,000 had been spent by him and his companies, did actually strike the ore in the Elephant stope in October or November, 1906. But it is not true that it was discovered *on the line* dividing the Conkling from the Belmont ground. It was discovered at a point marked Station 1856, in the McKay cross-cut, at the winze there shown, far within the admitted confines of the Conkling claim, and a great amount of ore was mined and appropriated to the easterly of the 135.5-foot line. (Rec. 5188. Hurley, p. 179. Dailey 203, Map 492.) The facts as to the discovery of this ore, the acquisition of the Custer and Silver Hill claims from the Belmont company and the treatment accorded by the Silver King Company to its cotenant, stated by the Circuit Court of Appeals in its opinion (255 Fed. 740), are a sufficient answer, if any were needed, to the position now taken by the petitioner.

Respectfully submitted,

EDWARD B. CRITCHLOW,
WM. D. McHUGH,
WM. W. RAY,
WM. H. KING.

Solicitors for Respondent.

Addenda to Respondent's Brief, Case No. 158, October Term, 1920.

N-1

H. G. P.
J. V. W.

DEPARTMENT OF THE INTERIOR,
General Land Office,
Washington, D. C.,

N. July 19, 1904.
H. G. P.

The Honorable, the Secretary of the Interior.

SIR: I have the honor to submit the following proposed amendment of paragraph one hundred and forty-seven of the Mining Regulations, approved December 18, 1903. The amendment is necessary to conform, in both letter and spirit, with the provisions of the act of Congress approved April 28, 1904, (33 Sta., 545), entitled "An Act to amend Section 2327 of the Revised Statutes, relating to lands." The act relates to patented mining claims only, but it is clear that it must be made to apply to all *approved* mineral surveys, otherwise there would be only partial relief to the situation.

The amendment would meet all the requirements for information and instruction under said act. In working under the proposed amendment, there would be the right of protest by parties who may believe their rights are being interfered with by its application to their claims

whether patented or not, and the right of appeal from action by the surveyor general and of this office and cases will probably arise where a hearing will be necessary to determine the true locus of the claim, but all this is provided for by the rules of practice and regulations governing contests.

A further question arises in the application of the new rule, and that is the segregations with amended township plats required by paragraph 37 of the Mining Regulations. *It is apparent that if the locus of mineral surveys is hereafter to be determined by the monuments on the ground,* (italics ours) and the lottings of fractional agricultural tracts covered by these mineral surveys determined as heretofore by the *tie line,* there will be confusion to agricultural claimants. Attention is now called to this feature and the matter is being considered with a view of proposing at an early date an amendment to said paragraph thirty-seven.

Paragraph 147 of the Mining Regulations approved, December 13, 1903, reads:

147. If an official survey has been made within a reasonable distance in the vicinity, there should be a connecting line run to some corner of the same, and in like manner all conflicting surveys and claims should be so connected, and the corner with which the connection is made described. In survey of contiguous locations which are part of a consolidated claim, where corners are common, bearings should be mentioned but once.

Proposed amendment to read as follows:

147. If an official survey has been made within a reasonable distance in the vicinity, there should be a connecting line run to some corner of same. And all conflicting surveyed claims should be connected and the corner with which the connection is made described, and the connecting line and all lines describing the conflict shall be the 'lines actually marked, defined, and established upon the ground' by monuments substantially within the requirements under the law and official regulations and corresponding to the description thereof in the approved survey, if such there be, and the mineral surveyor should plainly and specifically state in his return whether such monuments are found by him and the conflict described accordingly, or whether none such are found and the conflict, therefore, described from the connecting line to a corner of the public survey or a United States mineral monument. In survey of contiguous locations which are part of a consolidated claim, where corners are common, bearings should be mentioned but once.

Very respectfully,

W. A. RICHARDS,
Commissioner.